

Coin Photography Artistic Judgment & Copyright Protection



By Kevin Flynn

Supreme Court front door,
Nikon D90,
Nikkor 10.5 Fisheye lens



Disclaimer

The author is not an attorney. The information provided herein this book is not meant to provide legal advice. You should consult with a licensed attorney if you wish legal advice.

The primary objective of this book is to provide an in-depth analysis of the criteria required to determine whether a photograph is copyrightable.

A secondary goal was to provide a glimpse at what might be required if you needed to litigate, which it is also better always attempt to find a reasonable solution through communicating first.

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PERSONAL OBJECTIVE

Having written fifty-three books on coins to date over the past twenty-eight years and taken approximately twenty to thirty thousand photographs of coins, the author understood the importance to learn the United States copyright laws that define the rules for protecting images and also comprehend the case laws that establish the guiding principles and interpretation of these laws. One of the primary objectives of this book is to have all the critical information regarding copyright protection in one resource.

In studying early American history, especially when our founding fathers were discussing and creating the principles of our laws, most were kept at a higher concept level. In this way, these laws could be interpreted and applied to the scenarios and environment of the time they are used; for example, in general, killing someone is wrong. In reading United States Supreme Court and Federal Court case law over the history of our country, you get a sense that the basis of all law is what reasonable people believe; with most complex scenarios being broken down into simple principles. Federal Courts in most cases attempt to present a complete analysis of the facts of a case, how the laws and guiding case law applies, if there is a need for a new interpretation of the law and its application to cover a different scenario, and a logical conclusion. Most of these cases are easy to follow and understand, even without a law degree.

In reading discussions covering coin photography and copyrights on coin forums and websites and in speaking with numismatic book authors, coin photographers, and the individuals in the general numismatic community, and also in the general public, it became apparent that most individuals in our hobby have not read or do not understand the applicable laws and case law covering copyrights of photographs. Many people here a term such as “slavish copy” relative to a photograph of a coin and automatically assume that all coin photographs fall within this scope and not protectable under copyright law, without understanding the criteria for establishing whether a photograph of a coin can be copyrighted. This of course is the furthest from the truth as most photographs are copyrightable.

There is no case law that specifically pertains to photographs of coins. What is important to note is that there are no absolute rules and tests that can be used to determining whether a work will meet the criteria for being copyrightable. There are several cases that provide general guidelines in making this determination. The important criteria being the choices and decisions that a Photographer makes that provide the creativity and artistic judgment in a work. These include the choices of camera, film, lighting, posing the subject, and so on. Each work must be evaluated upon its own merits. Using the general guidelines provided, a Court applies them to the works being adjudicated. The same guidelines can readily be applied to coin photographs. If you take coin photographs and wish to verify, they are copyrightable, it is important that you understand these simple guidelines and apply them to your photographs. You should be able to articulate your objectives and also demonstrate how your choices and decisions affected your photographs. Another objective of this book is to apply the laws and general guidelines of case law for copyright protection into many different scenarios involving photography of coins.

If someone asks the author for permission to use his coin photographs, the author normally has no issue in permitting them to use them. As the essence of numismatics is the sharing of

knowledge, this goes towards that objective. The author normally requested them to include his name with the photograph such as “photo from Kevin Flynn.” This helps protect the author’s images in case someone else uses his photographs without permission. When people have used the author’s coin photographs without permission, mostly on coin forums or eBay, the author will normally write them and explain that the photographs are his and request that they either remove the photos or include the author’s name with his photograph.

If you come to the point of needing to address a copyright issue through Federal Courts, it is extremely important that you are sufficiently prepared; one mistake could cause your case to be dismissed. A worse-case scenario is if you lose and the judge awards costs and attorney fees against you, if you need to file a Federal lawsuit, you better make sure that your suit is bullet-proof. This book attempts to cover all aspects of understanding whether your photographs are protectable under the copyright laws, how to protect them, what to do if someone uses your photographs.

The purpose of this book is NOT to encourage the use of litigation in order to resolve issues regarding copyrights. Litigation should only be used as a last resort, always first attempt to fix the issue directly with the other party. Litigation can take years to adjudicate, tens of thousands of dollars of expenses regarding costs such as depositions and attorney fees if necessary. Consider the amount of time and resources you will be involved during this process. Wouldn’t you prefer to be doing enjoyable things you enjoy? Once started, you should be ready and focused to fully research and understand all issues, take all legal steps required, have the patience to wait as the Federal Courts are sometimes overworked and sometimes take months to adjudicate motions. Even when you start a litigation, always be open to arbitration and mediation as this can sometimes resolve issues, but also you can better understand all perspectives, and also receive an analysis from the mediator, who is normally a retired judge. First do what is reasonable, then what is necessary.

The objective of this book is to cover how to copyright an image and also what criteria is used to determine whether an image is copyrightable. This book does not cover the many other important subjects that you need to learn regarding litigation in a Federal Courthouse.

Coin photography is a form of art. For almost every photograph, judgment is required to capture the subject matter in a manner that optimizes and enhances those elements of the subject matter that are being presented to the viewer. There are many challenges in coin photography, especially with macro-photography. For example, many coins are encased in hard plastic cases, which requires proper lighting and angle of the coin to avoid light refraction and reflection. Most coins, especially early coins have different colors on the surface that need to be considered. Copper coins normally start out as red; but will change to brown over time and wear. The surface of coins can also be toned, depending on the environment they are exposed to and can require the lighting to be adjusted accordingly. Many of the elements of the subject matter being photographed are very shallow in depth on the surface of the coin, requiring proper tilting of the coin and lighting to highlight the outline of the sides of the element sought. In one case where very shallow die rust was being photographed on a high-grade proof coin encased in plastic, it took two months and purchasing different lighting sources to find the optimal combination to capture the image sought.

The author is one of the few individuals permitted to bring their own camera equipment in to photograph the coins that are part of the Smithsonian Institute National Coin Collection in Washington D.C., which is the largest collection in the world and also at the American Numismatic Society in New York. This is primarily based on the macro-photography that the author uses to capture the diagnostics and die varieties that are on the coins.

Included in many sections below are excerpts from the applicable law and case law. It is more accurate to present these directly rather than indirectly through interpretation. It is always suggested that you always research everything yourself. Learn and understand the applicable case law that provides the guiding principles. It is easy to copy and paste the title of any of the case law referenced herein, google, and read the entire case yourself. It is better to verify yourself than to make a mistake in front of a judge.

This book is also a study on the history and the essence of photography, transmission and use of light, and many other important elements used in taking pictures. In writing a book on a subject, one must normally fully research a subject to completely understand and teach others. This is sometimes considered one of the best reasons for writing a book, learning and passing on the knowledge gained.

There is a saying that a picture says a thousand words; there is an obvious reason for this. Compare the follow, which has a greater impact to the reader: stating “A tree fell on my house”, “it was a big fish”, or the following images. The photograph obviously gives a more complete description of the event and in this case the degree of damage caused or how big the fish was. Even if the person described the event with a complete analysis with a thousand words or more, the image would still normally be better understood and visualized in the viewer’s mind than a written description. It would also normally help the viewer draw their own conclusions easier. The importance of photography in capturing and communicating an event, person, place, thing, expression, celebration, and so on, cannot be over-stated.



INTRODUCTION

The true essence in the art of photography is the Photographer's vision and judgment. Throughout our life we see and experience emotions such as the thrill of victory; agony of defeat; passion between a couple when they marry; love of a newborn baby; sensation of accomplishment; adrenalin and action of sports; pain through injury; emptiness in lonely, and so on in an endless list of feelings and emotions that are part of our human nature. We are also privileged in being able to see and experience many of the natural wonders of the world and some of the incredible accomplishments of mankind. We normally remember these emotions and sights for a brief moment in our time, but with a camera we can capture them forever, frozen in time. The vision is the Photographer's perception of the subject, environment, emotion, and event, and capturing this in the exact moment of exposure. Sometime the Photographer is in the right place and right time to take the perfect photograph. Other times they may wait for weeks for the right conditions or subject.

In order to accomplish their objective and vision in the photograph, the Photographer uses their judgment to choose their tools and rendition of the subject. They visualize the subject in their mind before taking the photograph and continue to conceive the image through the photographing process, adjusting and adapting as needed. For example, if it is clear skies, overcast, foggy, sunrise, sunset, or other environmental conditions all contribute to the Photographer's choices of proper lighting, filters, ISO speed, aperture, to accomplish their goals. If at a sporting event, they might choose a camera that permits multiple sequential photographs and an auto focus zoom lens with capture fast moving objects at close or far distances. The Photographer perceives the essential qualities of the environment and subject. They interpret and make choices according to the knowledge, skill, experience, instinct, and judgment. The Photographer may add flavor and deviation according to their taste, style, expression, and objectives. They record the visible world, capture a moment in time to preserve its memory and history. For these reasons, it can be argued that photography is one of the more important inventions over the past millennium.

In general, copyright protection for photographs begins when the Photographer depresses the shutter button. If the photographs are just for private use, then you more than likely do not need to register your photographs with the Copyright Office. When taking photographs that are used books, web pages, or other public access sites, then it you need to consider whether you should register your photographs with the Copyright Office in case they are wrongfully used. This requires an understanding as to whether your photographs are protectable under the copyright laws in the United States and what steps you need to take to register you photographs. The copyright laws combined with the applicable case law can guide you to determine if your photograph meet the criteria for copyright protection and also what steps to take if your copyrights are violated. If borrowing photographs, it is imperative that you obtain the proper permission in order to use the photographs.

The Copyright laws for the United States are contained within chapters 1 through 8 and 10 through 12 of Title 17 of the United States Code. This includes the Copyright Act of 1976 and all amendments to the copyright laws since then. These acts cover the basic concepts of copyright protection for a work; which include photographs. But like most laws are written in a manner to be broad in nature to permit wide scope and coverage of the laws. As with most laws,

case law through Courts define the interpretation of the law and provides the guiding principles for other Courts to follow. One of the core cases to define the fundamental requirements for copyright protection is *Feist Publ'ns Inc., v. Rural Tel. Service C.*, 499 U.S. 340 (1991), United States Supreme Court. The Supreme Court stated in *Feist* that there are two primary requirements for a work to qualify for copyright protection: 1. *The work must be original to the author and independently created by the author.* The Court further stated that “a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying.” 2. It also must possess a minimal degree of creativity. The Court further defines the level of creativity required as “*extremely low, even a slight amount will suffice.*”

From these basic requirements it might appear that the majority of photographs, except those that are the result of copying, qualify for copyright protection. Several Federal Courts have further outlined the criteria for the originality and creativity aspects in establishing whether a work can be copyrighted.

The creativity element entitled to copyright protection pertains to the photographer's decisions and artistic judgment used in creating the photograph. The creativity aspect is also sometimes called the original expression. The creativity includes those choices and decisions in creating the photograph such as: selection of the film, camera, lens, filter, and lighting; taking of the photograph, including the angle of the camera, posing of the subject, perspective, type and angles of the and lighting, shading, focus, and so on; and also includes choices in the post processing of the photograph in order to enhance its expression. These are the essential elements that form the original expression in the art of photography. Each of these elements becomes the incremental contributions to the creativity in the photograph, which becomes the foundation to a work meeting the criteria for being copyrightable.

If a Photographer considers or changes these elements for each photograph, then the incremental contribution for that element becomes stronger. For example, if the Photographer refocuses for each subject, then this is a stronger contribution. If a Photographer chooses an element that is applied to multiple photographs, then the individual contribution for this element is not as strong. For example, if the Photographer chooses a specific camera and lens to take all photographs, then the incremental contribution is still present, but not as strong compared to being considered or changed between each photograph.

For most photographs, the Photographer should be able to articulate and demonstrate the creativity used in creating the photograph. Articulate means to describe the objective and decisions used in taking the photograph. Demonstrate pertains to describing and showing the differences created in the photograph. For example, using higher ISO speed film is good for low light photography. Using Black & White film can help improve contrast in the images. In many of the case laws that pertain to copyright infringements of photographs, there is usually a description of what the Photographer's objective and creative decisions and choices were used in taking the photograph that met the standards for a photograph being copyrightable. For some photographs, the creativity is in the timing of the photograph, such as in a sporting event. In a simple example, a parent taking photographs of their family during the holidays. Some photographs show the family posing together, while others capture their expression when opening their gifts. These photographs would normally be copyrightable based upon the

Photographer posing the subjects or the timing of what is captured in the photographs. The objective in this example would be to pose the subject or in the timing and capturing the surprise. The demonstration is reflected in the resulting photographs through the posing of the subjects or timing of the photographs.

Creativity is a core requirement for a photograph being eligible for copyrightability. There are several exceptions that will normally prevent a work from qualifying for copyrightability. These are: slavish copy; no creativity used in creating the work; a work created through an automated process, Artificial Intelligence (AI), or machine generated output. The AI and machine generated output is also not currently eligible for copyright protection as the copyright owner and originator of the work must be human.

A “slavish copy” is primarily defined as a photo of a photo. For example, if the subject matter is a bald eagle in the wild, if an image of the eagle is photographed, then the image of the eagle photographed is most likely copyrightable. If the photograph of the eagle becomes the subject matter, and a photo is taken of the original photo, then the subsequent photo is normally not copyrightable as it lacks the originality requirement, it is simply a copy of the original photo. A slavish copy will also fail as it lacks the creativity criteria to be copyrightable. An example of a slavish copy include color transparencies of a painting and is not copyrightable. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999). The Court stated:

A work lacks creativity if it is created without any original expression of the Photographer and whose objective is just to create a reproduction of the subject with no choices or artistic judgment used. Examples of images that are not copyrightable because they lacked the creativity include: A hand drawn sketch where plaintiff’s work was drawn with the express intention of duplicating on paper the appearance of an object. *J. Thomas Distribs., Inc. v. Greenline Distribs., Inc.*, No. 95-cv-2100, 1996 WL 636138, at *2 (6th Cir. Oct. 31, 1996). Photographs of common Chinese food dishes are not copyrightable as these images lacked the creative element that would render them original works. *Oriental Art Printing, Inc. v. Goldstar Printing Corp.* Examples are presented in different sections showing case law that found works that were not eligible for copyright protection as they lacked creativity. Alternative scenarios are offered for these scenarios showing under what circumstances or choices the work might be considered copyrightable.

In the United States, our current copyright protection laws apply only to works created by humans and not to AI and computer generated algorithms and programs. These laws and case law require a human author who created the work and also that the work contain a minimal degree of creativity and original expression. If a process is automated and no interaction by the User to create a work, then there no choices and artistic judgment that for the basis for a work being copyrightable.

Examples of coin photography that would more than likely not be eligible for copyright protection include: 1. Using no creative judgment in taking a photograph of a coin. For example, laying a coin flat on a table and using a point and shoot digital camera to take a simple photograph of the full coin with the objective of simply creating an accurate image of the coin. With the coin laid flat on a table, using a cell phone to photograph a coin with no special effects,

lighting, or other manual operations requiring choices by the Photographer and with the objective of simply creating an accurate image of the coin; 2. Using an automated process to take photographs of coins with no choices or artistic judgment used for the photographs. For example, setting up a computer and camera to automatically take photographs of all coins; 3. Performing post processing of the image, such as resizing, with no creative intent or objective.

In general photographs are copyrighted to the Photographer when the shutter is depressed. Including the photographs in a book or web page with the copyright symbol has the same level of copyright protection already assigned to the originator of the photograph. But including the copyright symbol also puts potential infringers that a copyright is claimed for the work and identifies the copyright owner and year of first publication. If a photograph is wrongfully copied and used, then before you file a lawsuit with the Federal Courts, the photograph must be registered with the Copyright Office. It is also very important to submit your works for copyright protection timely. If you submit your book or photographs to the Copyright Office after they have been infringed upon, you might not be able to seek statutory damages under Title 17.

It is simple to submit a book or photographs to the Copyright Office with the proper fee and application, or to submit photographs to the Copyright Office through their website. It is important to read the instructions and follow the rules, for example if submitting multiple photographs through the web page, all of the photographs should be originated in the same year.

A relatively new law (1998) is called the Digital Millennium Copyright Act of 1998. Part of which established 17 U.S. Code 12 – Copyright Protection and Management Systems. These laws help protect the Copyright Management Information (CMI) that is included with photographs to identify the owner of the photograph. The CMI includes a digital water mark on the photograph or name of the copyright owner around the body of the photograph. These laws prohibit the intentional removal of the CMI or distributing the photographs knowing the CMI was removed. The laws and case laws regarding this Act are included in this book.

Have you wished you had a camera to capture the moment? The author and his wife were biking around their development with the wife in front of the author about 15 feet. The author was looking down at the road and suddenly saw a large shadow. The author looked up and saw a large eagle swoop over the top of his wife, about 5 feet above her head, with about a 10 foot wing span and grab a dead squirrel about 15 feet in front of her, it was one of the most amazing close encounters with a large raptor the author and his wife ever had. We retold the story many times over the next few weeks, describing in detail the sheer awe of the encounter, the size, power, emotion of the event. No matter how we described it, a picture, for example from a GoPro would have been self-evident and required no explanation, whereas words could only describe it so far, there would always be something not expressed. Describing a picture can sometimes easily take 1,000 words.

A photograph is a representation of a subject or a free interpretation of it. The vision and perception of the Photographer through their creative choices and artistic judgment is used to capture and compose their photographic work of art.

PHOTOGRAPHY

This section primarily describes the history of photography, with later sections explaining the Court's perspective of photographs and the need for copyright protection for them.

Photograph - A picture made using a camera, in which an image is focused on to light-sensitive material and then made visible and permanent by chemical treatment.

The first photograph by a camera was taken by Nicephore Niepce of Paris in the mid-1820s, in a process called heliography, using a pewter plate covered by a thin coat of light-sensitive solution of bitumen of Judea (a type of asphalt or petroleum tar), dissolved in lavender oil. The first successful photograph is believed to be of the courtyard of his estate, Le Gras. It took several hours of sun exposure to capture the positive image that were usually crude in nature. Louis Jacques Mande Daguerre joined Niepce in 1829, with the process being improved before Niepce's death in 1833.



1826 photograph of the courtyard of Nicephore Niepce estate, Le Gras.

In 1839, Daguerre introduced the daguerreotype process, which was the first commercially available process. This only required roughly 30 minutes of exposure to produce the positive image. He also used a more sensitive resin and improved the exposure treatment, which results were greatly improved in detail and clarity of the image. Daguerre discovered how to use iodized silver on the plate which can become visible when exposed to mercury vapor that settles on image after it is exposed. If the developed photograph was exposed to light, the unexposed area of silver darkened. This was fixed through a solution of table salt to dissolve the unexposed silver iodide. Daguerre used a meniscus lens for his camera made by Charles Chevalier and N.M.P. Lerebours of Paris. In 1839, Niepce's son and Daguerre sold the daguerreotype process to the French government, which process was used until the 1850s.



1838 daguerreotype made by Louis Daguerre of the Boulevard du Temple in Paris is considered the first photograph to include people.



September 29, 1839, daguerreotype photograph of Central High School taken by Joseph Saxton from the U.S. Mint building. This is the oldest surviving photograph taken in the United States.

In 1835, William Henry Fox Talbot of England created a process in which he soaked paper alternatively in solutions of salt and silver nitrate producing light-sensitive silver chloride. This would be developed into a translucent negative image, which was at first fixed by fixing the print using a strong solution of sodium chloride. The process was fixed in 1839, with the help of Sir John Herschel, by fixing the negative with sodium hyposulphite and waxing the negative before printing a positive image. The process called the calotype, which was the first that first produced negative photographic images. The negative could then be developed through chemicals producing a positive photograph. This provided the ability to produce multiple images from the same negative.



1843 salted paper print from paper negative by William Talbot titled “A View of the Boulevards of Paris.”

The first photographic studio, called the Daguerrean Parlor, opened in New York City in 1840 by Alexander Wolcott. Richard Beard, who had acquired the Daguerre’s process in England, opened a studio in London in March 1841 and with the help of chemist John Fredrick Goddard was able to create portraits in size up to 1.5 by 2.5 inches. Improvements were also being made in the cameras and lens during this period. In Vienna, Jozsef Petzal and Freidrich Voigtlander created the achromatic portrait lens that was much faster than the meniscus lens used by Daguerre. Voigtlander also improved the camera to make it easier to transport.

In 1841, Hippolyte Fizeau used silver bromide instead of silver iodine as it had a much greater sensitivity to light, reducing exposure to a few seconds, which made it possible to photograph portraits. He also improved the brilliance of the daguerreotype image by using gold chloride. In 1841, Fizeau demonstrated how the positive image of the daguerreotypes could be printed on paper by applying nitric and hydrochloric acids, which reacted with the silver and the silver amalgam that composed the image, producing a slight relief and then filled with linseed oil. Gold was added to the unprotected areas through electroplating, which resisted the acids. This resulted in an intaglio plate that could be used to print ink on paper. Although crude, the images retain the precision of the original daguerreotype. Also in 1841, Frank Kratochvila combined vapors of chlorine and bromine, which greatly helped increase the sensitivity of the plate.

In 1843, Anna Atkins’s book, *Photographs of British Algae*, was the first photographically illustrated book. Atkins’s father, John Children, was friends of William Talbot and John Herschel. Instead of drawing the plants, she used Herschel’s process called cyanotype to create impression of the plants. Atkins only created 17 handmade copies of her book, which each were distributed with the cyanotype photographs. Atkins’s images were not photographs created from a camera, but were photograms, which is an image created without a camera. The process Atkins used was also called blueprinting. The subject was laid on paper covered with light sensitive material, ferric ammonium and potassium ferricyanide, then exposed to light. It was then washed with water with the uncovered areas of the paper turning to a deep blue. The resulting negative contained variation in tone dependent upon the transparency of the subject.



1843 cyanotype photograph of algae by Anna Atkins.

Eight months after Atkins book, William Talbot published *The Pencil of Nature*, which became the first book to contain photographs that was commercially available. Talbot's book contained 24 cyanotype photographs, each one pasted into the book by hand. Both of these books were produced unbound, which was normal during this time period.

The majority of early books and newspapers did not use the photographs themselves in the books or newspapers, but instead used photographic etchings on a copper plate. The first photograph to be used in a newspaper was published as an engraving in the *L'Illustration* in Paris, July 1848. It was taken during the June Days Uprising on June 25, 1848.



June 25, 1848 daguerreotype photograph taken by Thibault of the Barricade in rue Saint-Maur-Popincourt before the attack by General Lamoricière's troops.

In 1847, Abel Niepce de Saint Victor improved the calotype process through the use of glass instead of paper, with the silver bromide adhered to the glass with albumin (egg white) creating much sharper negative images. In 1851, Scott Archer created the wet collodion process for making glass negatives. This process increased the speed and greatly enhanced the image quality by using a combination of soluble iodine and collodion (nitrocellulose in a solution of alcohol and ether) on the glass plate and then dipped a solution of silver nitrate to form silver iodine. The problem was that the glass plate had to be immediately processed after the photograph while the solution was still moist. After the plate was exposed in the camera, it was developed with pyrogalllic acid and then sodium thiosulfate. Paper prints could easily be made from the glass negatives. In 1871, Richard Meadox of England, fixed the problem of immediate processing by replacing collodion with gelatin.

Photographs were not cheap, in 1851, photographer Augustus Washington listed prices ranging from 50 cents to \$10. Photography spread quickly throughout the United States, Europe, and the rest of the world. By the late 1840s and early 1850s, most major cities in the United States had portrait studios. Explorers and dignitaries also included photographers. For example, American photographer Eliphalet Brown accompanied Matthew Perry to Japan in 1853. Through the remainder of the 19th century constant improvements were made in the equipment, chemicals, and process in creating photographs. In 1884, George Eastman of New York, the founder of Kodak, developed a dry gel on film, or celluloid rolls, to replace photographic plates. Eastman introduced the Kodak camera with the slogan “You press the button, we do the rest.”

In 1848, the first attempt at reproducing colors through photography was by Edmond Becquerel. Niepce de St-Victor was able to reproduce color using a layer of pure chloride on the silver plate, but the results were unstable. In parallel to seeking capturing colors in photographs, hand-coloring of black and white photographs was used. In 1861, James Clerk Maxwell a Scottish physicist, discovered that all colors can be made through a combination of red, green, and blue light. Louis Ducos du Hauron was the first to create a stable color photograph in 1869. He took three black & white negative photographs of the same subject, using three different filters: red, green, and blue. He then created three positives, dyed the three positive images with the colors used for the corresponding filters, finishing by superimposing the images. The difficulty with these early experiments was the limit of the sensitivity of the materials to the color spectrum.



1861 color photograph created through the taking of three photographs of a tartan ribbon using different filter each time: red, yellow, and blue filters. The three developed negatives were combined to produce a single color composite image. Created by physicist James Maxwell and Thomas Sutton.

In 1891, Gabriel Lippman, a physics professor at Sorbonne discovered a method to create color photographs on a single plate, for which he receive the Nobel Prize in 1906. The process was too complex and required an extremely long exposure for commercial use. In 1894, Dr. John Joly of Dublin used very fine red, blue, and green coats on the glass plate to simulate a three colored filter. This process only a very limited color sensitivity with poor results.

Auguste and Louis Lumiere, two French brothers created the autochrome, the first successful color process to be used commercially. The brothers created cinematographe in 1895 and also wrote an article on color photographs in the same year. They presented their process for the autochrome to the French Academy of Science in 1904 and by 1907 produced autochrome plates for commercial use. The process involved starch grains being dyed red, green, and blue-violet and spread over the glass plate with charcoal powder over top to fill in any gaps. A roller was then applied to the glass plate to spread the grains followed by varnishing and applying a coat of panchromatic emulsion.

The problem with the autochrome process was a long exposure time, which was caused in part by adding together a combination of red, green, and blue light filters, which absorbed these colors, blocking out other colors and a substantial amount of light. It was possible that grains of different colors being not equally distributed on the glass producing colors not reflective of the subject.

To help improve the amount of light absorbed, filter colors of cyan, magenta, and yellow were used. Cyan absorbs red light and reflects blue and green light, magenta absorbs green light, and yellow absorbs blue light. The use of these colors, called subtractive colors, permitted a greater

array and amount of light to be filtered through. In addition, using dyes or pigments rather than filters helped improve the process.

Kodachrome film was released in April, 1935 for 16 mm home movies and 35 mm slides in 1936. It was invented by Leopold Mannes and Leopold Godowsky. Working at Eastman Kodak research laboratories in Rochester, NY, Mannes and Godowsky used black and white film with cyan, magenta, and yellow dyes added through a repetitive process of dyeing and then bleaching.

Research for digital images began in the 1950s with digital image made through a computer was in 1957 by Russell Kirsch; with the image being of his son. In the late 1960s, William Boyle and George Smith of Bell Labs created the charge-coupled device ("CCD") that were used in the first digital video cameras for television broadcasting. The first digital color photograph was produced by Michael Tompsett in 1972. The first digital camera that was portable was created by Steven Sasson of Eastman Kodak in 1975; it weighed 8 pounds and used CCD image sensor chips that took approximately 20 seconds to capture the image. In 1990, the first commercially available digital camera, called the Dycam Model 1 was produced.

In *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000), the Court provide a history on photography, they stated:

Photographs did not receive federal copyright protection until the Act of March 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198. See also Cong. Globe 981 (Feb. 22, 1865); William Patry, 1 Copyright Law & Practice 248-253 (1994) [hereinafter "Patry"]. However, photography had become an established commercial endeavor as early as 1839, when the French government made the daguerreotype process available and William Talbot produced negative images on paper through a process called, eponymously, "Talbottype." See Naomi Rosenblum, A History of Women Photographers 42 (1994) [hereinafter "A History of Women Photographers"]; Naomi Rosenblum, A World History of Photography 47 (3d ed.1997) [hereinafter "A World History of Photography"]. The following year, Alexander Wolcott and John Johnson established the first commercial photography studio in the United States here in New York City. Four years later, Mathew Brady, whose subsequent photographs of the Civil War would gain world-wide recognition, established his studio in lower Manhattan. See A World History of Photography at 47. By the 1850s, small cartes-devisite photographs were exchanged with all the passion baseball cards would be traded a century later. Even Queen Victoria is reported to have collected more than one hundred albums of photographs of European royalty. See A World History of Photography at 64.

The reason for the delay in extending federal copyright protection for photographs will likely never be known, but the increased post-Civil War commercial popularity of portraiture photography by leading figures such as Mathew Brady, Napoleon Sarony, and Julia Margaret Cameron may have led to widespread piracy, and, therefore, calls for protection.

Even though photography had been poetically referred to as "drawing with the aid of the sun," [i]t was not yet clear whether photography could produce art or merely a record, whether it would be just a pastime or could fulfill more serious purposes, whether it was limited by its current technology or could be expanded in unforeseen ways. But from the start photography was perceived to be a different kind of picture making an easier

version of an activity [painting] that had required a degree of talent and training not available to many.

A World History of Photography at 39 Painters, like many faced with the introduction of a new technology, feared the end of public interest in their art. Critics derided photography, declaring that the new medium "copies everything and explains nothing, it is blind to the realm of the spirit." *A World History of Photography* at 210. Yet, some photographers' skill inspired high praise. Critic Phillipe Burty, reviewing an 1859 exhibition of photography by Gaspard Felix Tournachon (a/k/a Nadar), wrote, "his portraits are works of art in every accepted sense of the word.... [I]f photography is by no means a complete art, the photographer always has the right to be an artist." *A World History of Photography* at 72.

In the United States, some photographers quickly seized on the new medium as a means to express artistic as well as political and social sentiments. See Margaret Loke, *In a John Brown Portrait, The Essence of a Militant*, N.Y. Times, July 7, 2000, at E30 (describing a striking 1846 photograph of abolitionist John Brown by African-American photographer Augustus Washington, who touted his artistic skill and his intention of using that skill to contribute to the advancement of "the oppressed and unfortunate people with whom I am identified").

The ambivalence and occasional antagonism toward photography expressed by painters and art critics spilled into the debate over whether to extend copyright protection to photographs. It was not until 1948 that the Berne Convention for the Protection of Literary and Artistic Works enumerated photographs as a mandatory subject matter. Prior to that revision, protection was either on a reciprocal basis or extended only to "artistic," as opposed to "ordinary" photographs. See Patry at 254. Even for "artistic" photographs, a minimum term of protection of twenty-five years from the making of the photographic work was not required until the 1971 Paris Text of the Berne Convention. See *Berne Convention for the Protection of Literary and Artistic Works*, July 24, 1971, art. 7(4) (Paris text 1971); Patry 253-254. The Universal Copyright Convention still does not require protection for photographs. See *Universal Copyright Convention*, July 24, 1971, art. IV(3) (Paris text 1971). Article 12 of the Trade-Related Aspects of Intellectual Property Rights Agreement (part of the 1994 Uruguay Round of the General Agreement on Tariffs and Trade), allows member countries to exclude photographs from the general requirement of a term of protection of life of the author plus 50 years. See *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, MTN/FA 11-A1C (1994). Only recently has international protection for photographs taken a significant step forward: Article 9 of the 1998 World Intellectual Property Organization Copyright Treaty signatories from applying the Berne Convention's Article 7(4). See *WIPO Copyright Treaty*, CRNR/DC/94 (1998). The effect is to extend the protection for photographs to the life of the author plus 50 years.

The dual standard applied by the Berne Convention — "artistic" photographs could be protected, but "ordinary" photographs could not — stemmed from doubts over whether photographs were the result of the photographer's creativity or were instead the result of the technical process of photography. Those doubts took on constitutional dimensions in a challenge to the Act of March 3, 1865 in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S. Ct. 279, 28 L. Ed. 349 (1884). In *Burrow-Giles*, plaintiff Napoleon Sarony was a successful celebrity photographer who produced inexpensive cartes-de-visite and

larger cabinet cards favored by actors as publicity shots. See *In The Waking Dream: Photography's First Century* 339-40 (M. Hambourg, et al. eds., Metropolitan Museum of Art 1993). In 1882, twenty-seven-year-old Oscar Wilde came to the United States at the invitation of theater producer Richard D'Oyle Carte as part of the production of Gilbert & Sullivan's operetta "Patience," satirizing Wilde's "aesthetics" movement. Eager to be in the limelight, Wilde sought out Sarony for a series of publicity photographs to use on his tour of the United States: Wilde appeared in Sarony's studio dressed in the attire he would wear at his lectures: a jacket and vest of velvet, silk knee breeches and stockings, and slippers adorned with grosgrain bows — the costume he wore as a member of the Apollo Lodge, a Freemason society at Oxford. Sarony took many photographs of Wilde, in a variety of poses. Here, his features not yet bloated by self-indulgence and high living, Wilde leans forward toward the viewer as though engaging him in dialogue, the appearance and calculated pose of the dandy secondary to the intelligence and spontaneous charm of conversation.

In The Waking Dream: Photography's First Century at 339-340. In all, Sarony took more than twenty photographs of Wilde and registered them with the Copyright Office. Defendant Burrow-Giles, a lithographer, sold a staggering 85,000 copies of one of Sarony's photographs, "Oscar Wilde No. 18," without Sarony's permission. See *Burrow-Giles*, 111 U.S. at 54, 4 S.Ct. at 279. Because substantial similarity was not an issue, Burrow-Giles mounted a direct constitutional attack on Congress's authority to protect any photograph. Burrow-Giles asserted that "writings" under the Constitution were limited to literary productions and that photographs did not involve authorship since they were the result of a mechanical process. See *Burrow-Giles*, 111 U.S. at 55, 4 S.Ct. at 280. Only the latter argument is relevant to this case.

Burrow-Giles argued that photographs were "the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involve[] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in [the] shape of a picture." *Burrow-Giles*, 111 U.S. at 59, 4 S.Ct. at 281. Once the image was captured on the photographic plate, the resulting photograph followed mechanically and inevitably. The Supreme Court did not reject Burrow-Giles' attack entirely, observing that a lack of originality may be "true in regard to the ordinary production of a photograph [I]n such a case a copyright is no protection." *Burrow-Giles*, 111 U.S. at 59, 4 S.Ct. at 282. However, the Court found that Sarony's "Oscar Wilde No. 18" was no "ordinary" photograph and that Sarony was an author based on the trial court's findings that the photograph was a new, harmonious ... and graceful picture, ... that plaintiff made ... entirely from his own mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.

In *Wood vs Abbott*, Circuit Court of New York, in 1866, the Court stated regarding the photographic process used that:

The original picture is transferred to a prepared glass plate, according to the well-known practice of photographers. This copy of the original is called a negative, and, as seen in the medium of transmitted light, the lights and shadows of the original are reversed. A sheet of prepared paper is then laid upon the plate, both paper and plate are put into a frame of the proper size, in which pressure is applied to the paper by appropriate means, so as to bring the paper into contact with the plate throughout its entire surface, and then the plate is exposed to the light of the sun. The rays of light transmitted through the glass, throw the picture on the prepared paper, and fix it there in positive light and shadow. By this means, reduced copies of the original are extensively multiplied. The pressing of the paper upon the glass plate, is to make the contact of their surfaces perfect throughout, in order to prevent the diffusion of the light, and the consequent blurring of parts of the picture, which would occur in spots where this contact did not take place. In other words, the pressure is to hold the paper to the glass plate, in such a way as to secure a uniform chemical action of the light on the paper, controlled or disturbed in no way, except by the shadowy image on the glass itself. The rays of light paint or delineate, by chemical action, the image on the paper, guided by the image on the glass. These rays paint it in just the same way in which they paint the negative on the glass, except that, in the latter case, they are reflected from the original, while in this they pass directly through the transparent plate. This is a new and beautiful art, discovered long after the statute in question was enacted. It is not a development of the art of making prints or engravings which existed at the date of the act. Then, a print was defined to be "a mark or form made by impression or printing; anything printed; that which, being impressed, leaves its form, as a butter print, a cut in wood or metal to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book," &c. As used in this statute, it was synonymous with the term "engraving," with which it is connected in the act, which means, in this relation, "an engraved plate; an impression from an engraved plate." This new art of photography, and all its kindred processes, is an entirely original and independent mode of taking pictures of material objects, and multiplying copies of such pictures at pleasure. That combination of creative or imitative power and mechanical skill by which the artist works out his own conception, or the embodied conception of another, in a fixed form, the fruits of which the law was intended to protect, is not brought into play. No block, plate, or stone is engraved. No figure is drawn, etched, raised, or worked on any surface from which copies are to be produced by impression or printed. The image thrown by light reflected from the original and passed through a camera produces a negative, and, when the light passes through the transparent negative on to paper held in contact with glass, it produces a positive. The image is no more formed by pressure when the positive is made on the paper held in contact with the glass plate, than when the negative is made on the glass by rays reflected from the original at a distance. In both cases, the only force that contributes to the formation of the image is the chemical force of light, operating on a surface made sensitive to its power. The springs in the pressure frame hold the paper firmly in contact with the glass, and thus prevent the diffusion of the light after it passes through the negative. This position of the paper and plate renders the operation of the light direct and strong, and brings out the lines of the picture clearly and sharply. The manufacture of these positives is called, in the language of this new art, "photographic printing."

COIN PHOTOGRAPHY

Before the age of coins, transactions were primarily performed through bartering; the trading of goods of equal value. For example, a farmer might need new tools, seed, clothes, and other items. He could trade his crops or live stock for the needed articles. Even if raw silver or gold were used for a transaction, there may be an issue of the purity of the metal, which would greatly affect its value. The question becomes how to use something that represents a value between two parties that can be used for transactions and that consumers can be comfortable and confident with?

Since the creation of coins around 610 B.C., billions of coins have been struck. Money forms the basis of our modern day commerce, through which we use as the foundation of transactions of goods and for services or work provided. Many countries have different currencies, but there are also global standards on the conversion rates between the different currencies. Some countries have merged their currencies into a single standard to make transactions between the countries or individuals traveling between the countries simpler, such as seen in most of Europe with the Euro. The United States and other countries previously used a standard whereas the value of a coin was equal to the value of the bullion in a coin. For example, a United States Morgan Dollar was worth one dollar in silver, but as the cost of silver and gold started to rapidly increase, using silver for the dime through half dollar was stopped by the United States Mint in 1964, with a few exceptions thereafter. Today the bullion value of coins struck are normally far less than the face value of the coin. A Washington quarter today costs approximately three cents to strike.

The images used on a coin normally reflect important people, places, events, history, or have some special symbolism of a country. In ancient times, the image on a coin normally showed the current king or important battles, in this way the coin could be used to transmit information across a country. The artistry used in designing these coins usually demonstrates the craftsmanship and artistic talent of a country. Proof coins generally exhibit the highest quality of strike, luster, and appearance of a coin. Coins have also been collected for many different reasons; such as rarity, the design used, investment, or just for the enjoyment. Collecting coins can sometimes feel like you are collecting part of the past of a country.



The above photographs are of Julius Caesar and were struck around 46 to 47 B.C. Ancient coins were often used to communicate who was in charge.



The two photographs on the left of the Eisenhower Dollar. The obverse contains one of our most beloved American Presidents. The reverse symbolizes the landing on the moon; one of the greatest accomplishments of the 20th century. The photographs on the right shows the Buffalo nickel, made between 1913 and 1936; symbolic of the American West.

In the United States, the first official coins were struck in 1792. Up through 1858, U.S. coins were collected only by a few individuals, most of whom lived around the U.S. Mints. Coin collecting increased exponentially through the remaining of the 19th century. Coin auctions were primarily of foreign and ancient coins through the first half of the 19th century, slowing changing to U.S. coins as collectors started to focus on proof coins and many of the new coins series that have been created during this period. Also, for the first half of the 19th century, there were many foreign coins still used in commerce in the United States. Coin collecting peaked in the 1950s and early 1960s. Computers, mobile phones, and other electronics have dominated the focus of the next generation, with few exploring hobbies such as coin collecting. With the 50 state quarter program, there was a resurgence of interest in coins with an estimated 100 million people collecting these coins. One of the nice benefits of the internet was the advent of many forums where people who share the same interest can have open discussions and share knowledge and discoveries. There are several sites related to coin collecting.

In 1842, William DuBois and Jacob Eckfeldt of the Philadelphia Mint, published a book titled: *A Manual of Gold and Silver Coins of All Nations, struck within the past century*. In 1851, a second edition was published titled *New Varieties of Gold and Silver Coins, Counterfeit Coins and Bullion, with Mint Values*.

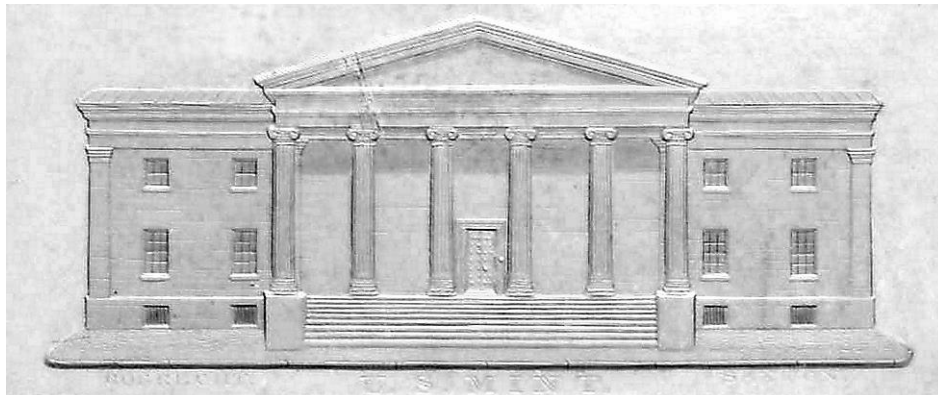
In the first book, *A Manual of Gold and Silver Coins of All Nations, struck within the past century*, written in 1842, there are coin images on the cover and in the back of the book. It states regarding the images that “*comprises a front view of the Mint of the United States in the title page, and sixteen plates (which find their place in this chapter) comprising about two hundred specimens of coins.*” It states under Chapter VI, Description of Plates, that the original plan was to have no photographs in the book as the cost to have engravings executed were too high. These are engraved plates that are a hard surface in which the design is engraved into and then used to make a print. A process was used to create the engravings whereas the images of the coins could be copied to engravings with only a little labor and expense, but still retain the accuracy. This is accomplished using a mechanical device which “*on point is tracing a line*

across the face of a medal, rising and falling according to the elevation and depressions over which it passes, another point shall draw, on a flat surface, a profile of this line”, ... “and the profile lines were drawn on an etching ground laid on copper or steel, by the etching-point.”

These engraved coin images were made through a mechanical process with the goal of duplicating the image of the coin exactly. The process used to copy the image is repeatable, with a subsequent process on the same subject would normally produce the same results. As such, there is no artistic judgment or creativity that was used in the creation of these images and they would not be copyrightable. If the engraved images were created manually, then there is a high probability that they would be copyrightable.

On page 189, it states regarding the image of the Philadelphia Mint on the title page of the book:

To obtain the vignette of the Mint (which is in the title page), as there was no medallion to rule from, it was required to go back to the original; and this necessity brought into play another brilliant invention of modern times, the daguerreotype. A picture of the edifice was taken with this instrument by Mr. Saxton, from which a copy was engraved in soft metal by Mr. Gobrecht, from this copy, counterpart was obtained in copper by the electrotype, and therefrom the engraving was effected.



1842 photographic engraving of the United States Mint building based upon the daguerreotype photograph by John Saxton.

In 1842, a photograph was taken of the Mint using the daguerreotype process. The photograph was used to make a copy in soft metal, then copper, from which an engraving was created, which was used in the book. The photograph of the Mint building would have been copyrightable. The subsequent copy in soft metal, copper, engraving, and the image used in the book would arguably all be derivative works of the original photograph, in a different medium, especially given that the objective was to reproduce the photograph exactly. As define under section §§ 101 of Title 17, a derivative work is defined as a work based upon one or more preexisting works. Therefore the image of the Mint building in this book would most likely be copyrightable as a derivative of the original photograph. It is also arguable that the image of the Mint building in this book would qualify as a photograph used in a book, and therefore this might be the first photograph ever used in a book. For both the photograms in Anna Atkins's book, *Photographs of British Algae*, and photographs in William Talbot book *The Pencil of*

Nature, the cyanotype photographs were pasted into the book by hand. During most of the 19th century, the normal process in printing required an engraving plate to be made. The design to be printed is etched into the engraving plate. Therefore if a photograph was taken and intended to be used in a book, the photograph would need to be converted to the engraving plate. For some very limited printing books, copies of the photographs were put into the book during the binding.

How many coin photographs exist today? The first United States coin auction to include a photograph of a coin was the 1868 Cogan sale of the McKenzie collection. Since then, millions of coin photographs have been included in coin auction catalogues and auction web sites. For example, Heritage Auctions has approximately six million photographs of coins on their web site. General sites such as eBay have contained millions of coins in their auctions, the majority of which contained photographs of the coins.

Since 1842, hundreds of books on United States coins have been published. If you include coin books published around the world, there are probably thousands that have been published. To give an idea, the author has published 53 books on coins and has taken approximately 30,000 photographs of coins over a 30 year period. There have also been thousands of newspaper, magazines, and journals that have been published on coins. In the past 20 years, there numerous internet forums, web pages, and other coin related web site that contain photographs of coins. This would be especially more true in recent times with improved photographic equipment available, especially in digital photography and improved smart phones that can easily take close up photographs the size of coins and allows the user to take hundreds and sometimes thousands of photograph on a memory card. The number of users who can take photographs of coins have expanded exponentially.

All told, it is guesstimated that there are probably over two-hundred million photographs of coins in one form or another. This is not just a random isolated area of photography. Given this, it is important to have established rules and guidelines that can be used to determine what coin photographs are copyrightable.

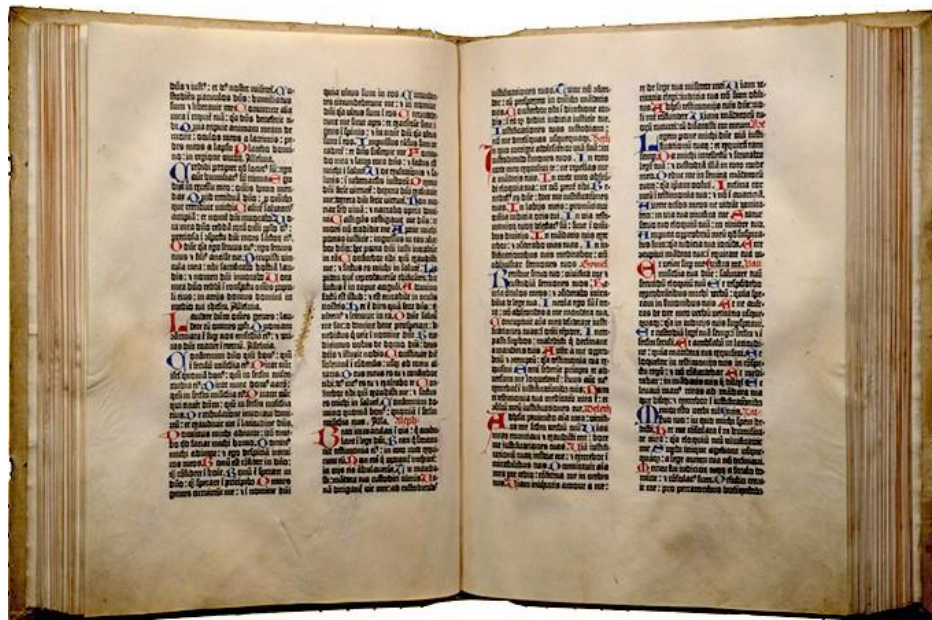
HISTORY OF COPYRIGHT LAWS

Copyright laws pertain to the legal, economic, publication, ownership, and reproduction rights of the creator of a work. The origins and necessities for rules governing these rights primarily began with the written word. Most early writings were controlled by a government, church, or groups with the financial and education means to produce a work. A government might want to control and censor the content of materials distributed to their people.

During the middle ages between 470 A.D. to around 1350, there was little in the way of science and art. With the advent of the Renaissance at the end of the 14th century came the rebirth of culture, art, science, thought, learning, and innovation. One of the more important inventions during this period was the printing press in the mid-15th century. The first printing technique was invented by the Chinese around 600 A.D. Wooden blocks containing words and pictures carved into them were used to press text onto paper; this process was labor intensive, not durable as the wood tended to split, required too many blocks covering the different words, and did not fully catch on. Up through the beginning of the 15th in Europe, books and documents had to be hand copied, which normally meant only a limited number of copies were made. This limited the written word to only the upper class who had access to this material would also slow the growth in learning of the vast majority of the population.

The earliest books are believed to have been made in China. The earliest known book that contains a clear date of printing is called *The Diamond Sutra*. It contains sacred Buddhist text and was printed in China in 868 A.D. It was made in several sections that combine to form a scroll that is 17-feet long. As stated on the scroll, it was commissioned by Wang Jie to honor his parents. Discovered in 1907 by explorer Sir Marc Aurel Stein. Today, it is in the collection of the British Museum in London.

Johannes Gutenberg's (1398-1468) printing press used the typesetting technologies developed in Asia, an improved oil-based ink, and a grape screw-type press used by farmers in Europe. Gutenberg's primary contribution was his letter molds, which he created from a durable metal alloy of lead, tin and antimony that would melt at low temperature, was easy to cast in a die, and was durable in the press. Each page was made up from a combination of letters arranged in a type tray. The type tray could be used to produce multiple pages and then the letters rearranged to create a different page. His first large scale printing was 180 illustrated two-volume Gutenberg Bible that were completed in 1455; the number of pages varied, but it averaged around 1280 pages. About 50 of these books still exist today with less than half being the complete two volume set. A complete two-volume Gutenberg Bible can realize over two-million dollars at an auction. His invention spread quickly across Europe, resulting in approximately a half million books printed by 1500. With more reading material available to the general public, the literacy rate and intelligence level increased throughout Europe, which was one of the primary stimulations for the Renaissance movement. The other primary factor was improved economic prosperity; which was helped with the decline of famine and the plague and general peace throughout Europe. New schools and colleges opened, libraries expanded and opened their doors to the public. Most early books were dedicated to religion, but expanded to science, technology, medical, the arts, and other subjects.



Photograph of Gutenberg Bible from the United States Library of Congress, Bible Section.

With the increased ability to print books and other materials motivated government control of the materials. The Licensing Act of 1662 in England established a register of licensed books to be controlled by the Stationery Company, a group of printers with the authority to censor the content of the books. The first statute specifically written for copyright protection dates back in Britain to 1710. Parliament enacted the Statute of Anne, which only pertained to the copying of book. The full title being "*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.*" This act established an author's ownership of a copyright work for fourteen year, with an extension for an additional fourteen years available if the author was still living at the expiration, which helped making the information usable in the public domain after a short period.

In the United States, the U.S. Constitution, Article I, Section 8, Clause 8 states that "*Congress shall have the power to* *To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*" The first implementation of Copyright laws was the Copyright Act of 1790, "*An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned.*" This law granted protection to U.S. citizens who authored maps, charts, and books to print, reprint, publish or vend the same for a period of fourteen years; with an extension of fourteen years available after the expiration. It also provided punishment for printing such map, chart, or book without written consent of the author, including forfeiting all sheets and the sum of fifty cents for every sheet illegally printed. The law also required the author to deposit a printed copy in the clerk's office of the district where they reside. Commencement of any legal action was to occur within one year after the cause of action arose. This law was meant to provide incentive to authors, artists, and scientists to create original works by providing creators with control of their work.

There were several major revisions and amendments of the Copyright Act including the following. With the Copyright Act of February 3, 1831, a revision of the Copyright act extended the period of protection to twenty-eight years with a possible fourteen year extension; included books, map, chart, musical composition in written form, print, cut; and extended the statute of limitations from one year to two (see Appendix B). With the Copyright Act of August 18, 1856, copyright protection extended to dramatic compositions, including the right to public performance. With the Copyright Act of March 3, 1865, Congress amended the Copyright Act to made photographs and photographic negatives copyrightable (see Appendix B). In 1870, the Copyright Act was revised to require registration of two copies to be submitted to the Library of Congress; copyright protection was extended to translations of literary works; works of art were added to protectable works. In 1873, jurisdiction of copyright cases was given to Federal Courts. In 1897, the Copyright Office and the Registers of Copyrights was established. In 1909, a major revision of the U.S. Copyright Act increased the period of copyright protection to twenty-eight years with a possible renewal of twenty-eight years; It also provided a broader scope of categories protected, including music; copyright protection was added to those works when a work was published and a notice of copyright was affixed. In 1912, the Copyright Act was amended to include motion pictures. In 1976, the Copyright Act went through a major revision. Copyright protection was extended to works published or unpublished, once they are fixed in tangible form. Copyright protection for works created after January 1, 1878 is set to life of the author plus 50 years. In 1998 the Digital Millennium Copyright Act provides protections among other things the Copyright Management Information.

The first copyright case to be addressed by the United States Supreme Court was *Wheaton v. Peters*, 33 U.S. 591, 1834, where the Court found there was no such common law copyright after publication and that an author of a work must follow the rules in securing a copyright, such as submitting a copy with the district court. In *Folsom v. Marsh*, heard before the Massachusetts Circuit Court in 1841, the owner and editor of a multi-volume collection of George Washington's letters sued Charles Upham for using hundreds of pages of letters in his book on Washington. Justice Joseph Story found Upham guilty of copyright infringement based upon the volume and extent that Upham used of these letters that "*the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another.*" The court's definition of what constituted a "*justifiable use of the original materials*" formed the basis of the "*fair use*" doctrine. In *Wood vs Abbott*, Circuit Court of New York, in 1866, which arose before the Copyright Act of 1865 went into effect, it was decided that photographs were not prints and therefore were not protected under copyright law. In the first copyright case regarding photographs after photographs were included in the Copyright Act of 1865, *Burrow-Giles Lithographic Co. v. Sarony*, on March 17, 1884, the Supreme Court upholds the copyrightability of photographs. Napoleon Sarony photographed Irish author Oscar Wilde in 1882 when Wilde visited New York.

In the July 1901 article by William Alexander Miller titled *Copyright Protection For Photographs*, in *The Photographic Times*, Vol. XXXIII, No. 7., it states:

The first photograph copyrighted in the office of the Librarian was one entitled "My First Cigar" by Mr. John Snedecor of New York, on July 23, 1870. It is No. 203 A, being a photograph of a painting by the artist J.G. Brown. It is almost impossible to learn the

title and date of the first photograph every copyrighted in the United States, as it is hidden in the records of many years of about seventy Circuit Courts.

The first one to produce pictures by the action of light on a sensitive surface was Thomas Wedgwood of England, in 1802; the first permanent ones by M. Niepce, in 1814; the first photo-print from a negative by Fox-Talbot in 1839, and the first photographic portraits by the American professors Draper and Morse in 1839. Daguerre had personally explained to Professor Morse his discoveries in the action of light darkening the salts of silver.

The following are listed in (<https://www.copyright.gov/timeline/>) as some of the first copyright registrations for several different categories and also some of the important registrations.

December 22, 1813, one of the first works registered. George Godsell Thresher registered his etching depicting the battle of the USS United States and the HMS Macedonian. Charles Clinton, District Court clerk for the Southern District of New York, annotates the registration with a freehand drawing depicting the copyright deposit.

February 23, 1831, the first musical work is registered. "Maid of My Love" by David L. Richardson and I.T. Norton. It is registered in the Eastern District of Pennsylvania.

May 15, 1855. Poet Walt Whitman registers Leaves of Grass with the U.S. District Court in the Southern District of New York.

July 10, 1870, "San Domingo," a travel account by De Benneville Randolph Keim, is the first to register their work for copyright in the Library of Congress.

August 31, 1876, French sculptor Frederic Auguste Bartholdi registers the "Statue of American Independence," depositing a photo model and artistic rendering of how the statue was to appear against the New York skyline.

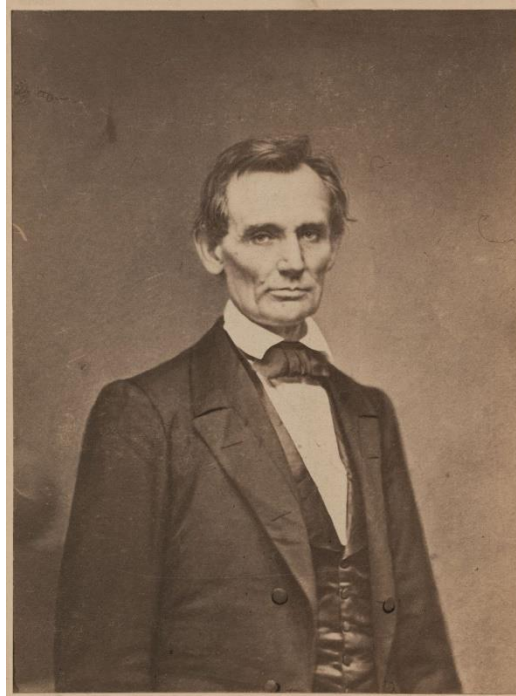
September, 1912, first motion picture registered. Republic Film Company registers "Black Sheep's Wool."

The first photograph in 1826 took several hours of light exposure to capture the image on the light-sensitive plate. By 1839, photography had evolved by leaps and bounds with the two primary processes being the daguerreotype, which produced a positive image and the calotype, which produced a negative image. During the 1840s and early 1850s, photography spread throughout Europe and most of the world. Many cities in the United States had portrait studios in the late 1850s.

Even though Congress did not add photographs and photographic negatives to the Copyright Act until 1865 does not mean that photographs were not registered for copyright protection till 1865. Before 1870, copyright registration was done at the district courts. It is possible that the different district courts used different rules for copyright registration or that they simply permitted registration of works, without determining whether they are copyrightable under the law. In looking at photographs today, we can register almost any photograph for copyright protection, but it is up to the Federal Courts to determine whether the photographs are actually copyrightable under the laws and case law. A Court may determine that photograph that has been registered contains no artistic judgment or creativity and therefore not copyrightable.

One of the most famous 19th century American photographers was Matthew Brady, who was known for his portrait photographs of celebrities, but remembered primarily for his photographs

of the American Civil War. Brady opened a studio in New York in 1844, calling it later “*First Premium New York Daguerreian Miniature Gallery*.” Brady would later open a studio in Washington D.C. On February 27, 1860, Brady photographed a portrait of Abraham Lincoln in New York, Lincoln at the time was running for President. This portrait was illustrated and distributed in many newspapers, and more than likely helped Lincoln become President by communicating with the public through his image. The photograph of Lincoln below can be seen in the National Portrait Gallery. Brady would take many more photographs of Lincoln when he was President, possibly helping the course of adding photographs to the Copyright laws in 1865.



1860 photograph of Abraham Lincoln by Matthew Brady.

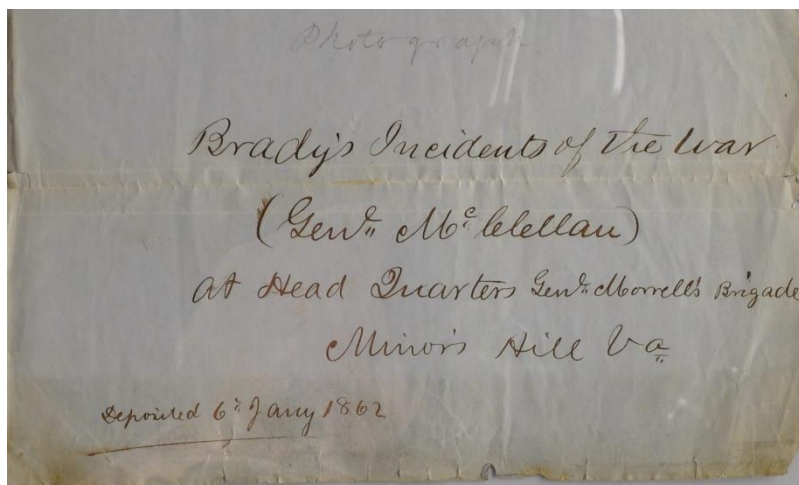
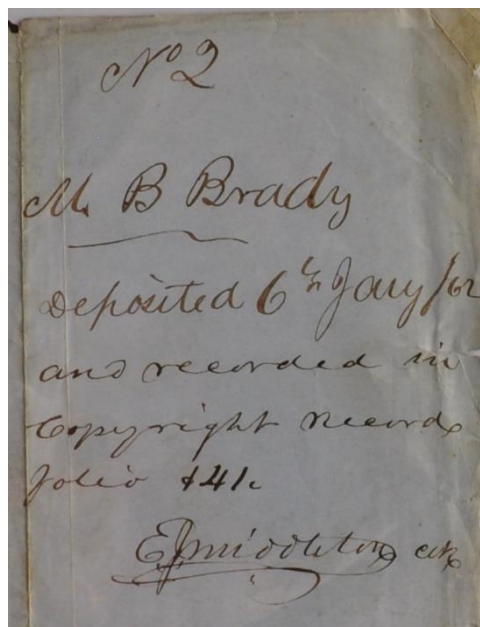
Brady had assembled a team of 15 photographers, who captured thousands of photographs during the American Civil War. The majority of these photographs can be seen in the Still Picture Unit of the College Park National Archives. The images of Brady and other famous photographers were seen in newspapers and books throughout the country, telling the story through the portrayal of the events and people. This also more than likely increased the admiration and demand for photographic images, which would increase the probability of the images being copied and used without consent of the author of the photograph and pushed the need for copyright protection to be extended to photographs. Brady registered several hundred of these photographs of the American Civil War before 1865 with the U.S. District Court for the District of Columbia and included copyright notices with his photographs. Had the copyrightability of these photographs been challenged through the Courts before 1865, Brady would more likely have lost.

In the Washington National Archives at 700 Pennsylvania Ave in D.C., Record Group 21 is for the “Records of the District Court of the United States.” Entry 40 contains “Title Pages of

Works submitted for Copyright, 1854 - 1863.” Based upon the Copyright Act of February 3, 1831, the author was required to:

That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book, or books, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the district court of the district wherein the author or proprietor shall reside

There were no photographic entries between 1854 and 1861. For 1862, there were slightly over 200 photographs registered by Matthew Brady and photographers who worked for Brady. No actual photographs were included, instead, a card with writing was entered for each photograph. The front normally had a sequential number, the Photographer, and the date the photograph was registered with the copyright office. The reverse of the card contained a description of the photograph. For example, the first photograph listed, which also has the earliest date of a photograph in this record is Front: “No. 2, M.B. Brady, Deposited 6 Jan/62 and recorded in copyright record folio 41c.” Back: “Brady Incidents of the war, (Gen McClellan) at Head Quarters Gen Morrell’s Brigade, Mirrors Hill VA, deposited 6 Jan 1862.”



Front and back of No 2 1862 card listing a photograph being registered for copyright.

It is important to note that 1860 and 1861 were both missing from this record. Most likely the first photograph of this record was in there, perhaps the first photograph from Brady to be copyrighted is the February 27, 1860 image of Abraham Lincoln. There were four different photographers who worked for Brady who were listed with the different photographs. Almost all of the records in the 1863 folder were 1862 dated photographs. Most likely the photographs from 1863 through 1869 are in the Library of Congress or were destroyed.

In another example, photographs numbers 47 and 48, 47 states on the front: *No 47, M.B. Brady, Deposited 5 May 1862*”, with the back: *“Brady Album Gallery, No 297, Falls Church, Entered*

according to act of Congress, in the year 1862, by M.B. Brady, in the Clerk's office of the District Court of the District of Columbia." These photographs were obviously registered with the district court even though they were before photographs were protection with the Copyright amendment in 1865.



Front and back of No 47 and 48 1862 card listing a photograph being registered for copyright.

When searching through the National Archive online catalogue, the primary focus was to search for any titles that contained the words 'copyright' or 'registration'. The Brady photographs were registered with the district court in 1862 and cards for each photograph submitted, which were found in Entry 41. There also should have been a record of the transaction with the district court. While at the National Archives in Washington, D.C., a record was found titled the "*General Records of the U.S. District Court of Potomac*", which contained many of the general administrative and clerk's records, but did not contain any transactions for copyright record submissions. It is important to look for other records in researching this subject as these records were called different names by the different district courts. It would be interesting to see what the district court called the image, perhaps they believed it to be included as a print, which would have been covered under the Copyright Act of 1831. It is also possible that many of these records were discarded over the years. Based upon the findings in *Wood vs Abbott*, photographs were not prints and were not copyright protectable before the Copyright Amendment of 1865.

The Still Picture Unit at the College Park National Archives was searched. There were thousands of photograph that were listed under Brady and his team of the American Civil War. The vast majority of them contained no dates. None contained a notice of copyright or stated that they were registered. The index cards were searched with the same results, no cards contained information regarding copyright or registration. There were no textual records of the district courts before 1870 at the College Park National Archives, these were all at the National Archives in Washington D.C.

Before copyrights were extended to photographs in 1865, some photographers would include “Copyright Secured” or other claim to assert that their images were registered with the district courts. As an example, on the bottom of some stereographic glass images was the label reading “*Entered according to Act of Congress in the year 1856 by F. Langenheim in the Clerk’s Office of the District Court for the Eastern District of Pennsylvania.*” The Eastern District of Pennsylvania District Court records are held at the Philadelphia National Archives. There was no record with ‘copyright’ in the title. A record named “*Clerk’s Cash Books, 1846 - 1915*” was manually searched with no registration of copyrights found. There were other records that contained dockets for the district court, but they were extensive and no sign of copyright registration in the summary. It is very possible that if there were records, they were destroyed at some point. The question becomes were photographic images permitted to be registered before the copyright act of 1865? Where these claims of copyrights false?

Another example is the image of Daniel Webster in 1851. In the Library of Congress Prints and Photographs Division Washington D.C., in the Daguerreotype collection, Putnam Herbert, 1861-1955 Papers, control number 2004664359, description: 1 photograph : whole plate daguerreotype, title: [Daniel Webster, head and shoulders portrait, facing left], created: 1851. Scratched into the plate at the lower right corner: “*Entered according to the Act of Congress in the year 1851, by Southworth & Hawes in the Clerk’s Office of the District Court of Massachusetts.*” In the Boston National Archives, there is one record that contains copyright in the title “*Copyright Account Books, 11/1856 - 6/1864*”, this record has not been studied yet.



Photograph of Daniel Webster from the Library of Congress.

Before 1870, copyright registration was done at the district courts. All of the district court records from this time period were moved to the national archives. In attempting to ascertain the first photograph to be registered for copyright protection in the United States, all of the National Archives, Library of Congress, all photographic museums, and web sites were contacted. No information on the first photograph registered for copyright was already discovered or known.

At the Philadelphia National Archives, in the record “*Copyright for the District Court of Delaware, 1797 – 1869*”, the first photograph registered for copyright was on April 29, 1865; being a photographic copy of an engraving. The District Clerk clearly distinguished ‘print’ from ‘photographic’. The April 24, 1865 states the work is a print, whereas the April 29, 1865 second entry states that it is a photographic copy of an engraving. It is doubtful that a district court made the mistake of calling a photograph a print and copyrightable before 1865. Prints and engravings were protected under the Copyright Act of February 3, 1831 (see Appendix B). Photographs were protected under the Copyright Act of March 3, 1865. Of course, today, an exact photographic copy of an engraving by the same author of the engraving would be a copy of the engraving in a different medium, and therefore copyright protected as a derivative work.

NOTE - Print - 4/24/1865

Be it remembered that on the twenty fourth day of April Anno Domini, one thousand eight hundred and sixty five, Samuel Marshall of said district, has deposited in this office the title of a print, the title of which is in the words following to wit: "The Two Fathers", the right whereof he claims as author, in conformity with an act of Congress, entitled, "An Act of amend the several acts respectfully copyrights."

Hanson Harman, Clerk of the Court

NOTE - Engraving - 4/29/1865

Be it remembered that on the twenty ninth day of April Anno Domini, one thousand eight hundred and sixty five, Samuel Marshall of said district, has deposited in this office the title of an engraving, the title of which is in the words following to wit: "The Champions of Liberty", the right whereof he claims as author, in conformity with an act of Congress, entitled, "An Act of amend the several acts respectfully copyrights."

Hanson Harman, Clerk of the Court

NOTE - Photographic Copy of an Engraving - 4/29/1865

*Be it remembered that on the twenty ninth day of April Anno Domini, one thousand eight hundred and sixty five, Samuel Marshall of said district, has deposited in this office the title of a **photographic copy of an engraving**, the title of which was deposited on the same day in this office for copyrights, the title of which said copy and engraving is in the words following to wit: "The Champions of Liberty", the size of which said copy he declares is to be eight by ten, or what is commonly termed full size the right whereof he claims as author, in conformity with an act of Congress, entitled, "An Act of amend the several acts respectfully copyrights."*

Hanson Harman, Clerk of the Court

Before photography, images were normally captured by artists through paints, drawings, statutes, and such. With the creation of the camera to capture photographic images, there were some who

argued that the process of photography was purely mechanical, whereas someone simply presses a button on a device, therefore there was no artistic or creative nature used by the Photographer in the taking of the photograph.

Before the Copyright Act of 1865 which incorporated photographs and negatives under copyright protection, the Circuit Court of New York in *Wood vs Abbott*, in 1866, found photographs were not protected under the law. The first Court to address copyright protection for photographs after the 1865 Copyright Act went into effect was in *Burrow-Giles Lithographic Co. v. Sarony*, on March 17, 1884. The Court found that photographs were copyrightable to the extent that the photograph reflects the creative choices the author uses to take the photograph. In the photograph of Oscar Wilde that were at the heart of the litigation, the Court stated regarding the creativity in the photograph: *"these creative choices included the particular pose (the unique features of which are recounted above in the quotation from the Hambourg book), selecting and arranging the costume, draperies, and other "accessories," as well as the lighting and shading. The combination of these choices was a "new, harmonious, and graceful picture," subject to protection."*

Through the years, the Courts have attempted to keep up with the advances in technology in the determination of how creative and artistic choices in photography would apply for copyright protection. With advances in digital cameras, mirrorless cameras, digital storage, automation in the photograph process, and post manipulation of the images through software to list some more of the commonly used elements, the Courts have attempted to address these improvements using the basic logic and concepts of creativity and artistic judgment. One of the fundamental questions is normally what were the choices that were made and how do they reflect in the image. The more visible the effect in the photograph, the greater the impact of the choice. With the advances in automation and simulated artificial intelligence (AI), this has added new wrinkles in adjudicating when the human element was removed from direct choices and moved more towards indirect choices. For example, create a process that a camera is set up to photograph a coin, and then repeated automatically to photograph the next 100 coins. An AI example might entail programming software to choose how to photograph a subject. Scenarios such as these are currently being debated by different countries and are presented in later chapters.

WORKS AND DERIVATIVE WORKS

The ‘works’ as used within the scope of the current copyright laws and case law pertain to those artistic and creative expressions created by an author. This book primarily pertains to copyright protection for photographs, but the logic and analysis should be applicable to other types of works also.

As defined by Black’s Law Dictionary, Abridged Seventh Edition, a work is:

2. *Copyright. As original expression, in fixed or tangible form (such as paper, audiotape, or computer disk), that may be entitled to common-law or statutory copyright protection. A work may take many different forms, including art, sculptures, literature, music, crafts, software, and photography.*

‘Medium’ is used throughout many laws and case law to primarily reflect where and how the work is stored and presented; that the work is fixed in a material form. As defined in several places, some of the definitions of medium include:

“The medium that an artist works in is the material or method used to create things.”

“A means or instrumentality for storing or communicating information.”

“A medium is a way or means of expressing your ideas or of communicating with People.”

As define under Title 17, section §§ 101 (see Appendix A), ‘works’ include the following: *“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”* A work is created when *“it is fixed in a copy or phonorecord for the first time.”* and *“A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”* The scope of what was covered under the copyright law has changed over time. The 1790 Copyright Act covered only maps, charts, and books. For photographs, the tangible medium of expression for film cameras is first the negative and then the paper the image is printed on. For digital cameras, it is the digital image that is created and saved.

For a photographic work, normally, the Photographer owns the copyrights of the work when they depress the shutter button and create the image. An exception might be if it is a work for hire and the Photographer assigns the copyrights to another party. Remember also that a photograph can be copyrighted, but this does not automatically imply that it is copyrightable. Only the Courts can truly determine whether a photograph exhibits enough creativity in order to be protected under the copyright laws.

A derivative work is a work based upon one or more preexisting works. Derivative works follow the same guidelines in the determination of originality and creativity for copyright protectable. Consider a basic scenario. A photograph is taken using a film camera. The image created from the negative and printed onto paper becomes the copyrightable work as it is in a fixed tangible medium of expression. The author scans the original photograph into a digital image. The

digital image is based upon the original photograph and contains the creative and artistic judgment that was used in the original photograph. The scanned digital image is a derivative work of the original photograph in a different medium. The copyright protection of the creativity used to the original photograph also applies to the digital image.

What if no creativity was used to take the original photograph? The author scans the photograph and using software, enhances the image, such as converting it to black and white or changing the brightness in order to create a specific effect and adding the creative element to the image. It is possible that the derivative work is copyrightable and the original work is not. In *Andrew Paul Leonard, d/b/a APL Microscopic vs. Stemtech International Inc*; Nos. 15-3198& 15-3247; August 24, 2016, the United States Court of Appeals for the Third Circuit. Leonard obtains cell samples from doctors, scientists, and researchers and pays a scientific research institution to use an electron microscope to photograph the cells. The images first appear in black and white, and Leonard uses his “artistic judgment” to enhance the photos with color.

What if the original work contains no artistic or creative element and is therefore not copyrightable. A third party creates a derivative work from the original without permission and then adds their own creative element to the derivative work through software. It is possible that there was no infringement of copying the original work and that the third party can copyright those creative enhancements made to the derivative work. If the original work is copyrightable and used by a third party without permission to create a derivative work, it would most likely be an infringement if the copyrightable elements of the original were included in the derivative, irrelevant whether the third party added their own creative elements to the derivative work.

A reproduction (derivative work) of a work of art or photograph by a third party is copyrightable so long as there is “*great skill and originality*” or “*substantial variation*” from the original work. The originality requirement means that the derivative work must contain a creative element added by the third party. The derivative work must also not contain those copyright elements of the original work. Take for example a hand drawn sketch of a painting. If the hand drawn sketch by a third party takes great skill and includes its own creativity or it includes substantial variation, then the third-party can possibly copyright the hand drawn sketch. The Court in *ATC Distrib. Grp. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712 (6th Cir. 2005), found that the objective of the hand drawn sketches from photos of transmission parts was to duplicate the appearance of the auto parts exactly, therefore involved no originality or creative spark. The lack of creativity would fail the second criteria that a work requires in order to be copyrightable.

As define under section §§ 101 of Title 17, a derivative work is defined as:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

As defined under Title 17, section §§ 103 · “Subject matter of copyright: Compilations and derivative works”, states”

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

In *Daniel P. Schrock, d/b/a Dan Schrock Photography vs. Learning Curve International, Inc., RC 2 Brands, Inc., and Hit Entertainment No. 08-1296*, 2009, the Court of Appeals for the Seventh Circuit stated regarding derivative works:

A “derivative work” is: [A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

17 U.S.C. § 101. The Copyright Act specifically grants the author of a derivative work copyright protection in the incremental original expression he contributes as long as the derivative work does not infringe the underlying work. See id. § 103(a), (b); see also Pickett v. Prince, 207 F.3d 402, 405 (7th Cir. 2000); Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997). The copyright in a derivative work, however, “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work.” 17 U.S.C. § 103(b).

The classification of Schrock’s photos as derivative works does not affect the applicable legal standard for determining copyrightability

The Nimmer treatise maintains that the quantum of originality required for copyright in a derivative work is the same as that required for copyright in any other work. See 1 NIMMER ON COPYRIGHT § 3.01, at 3- 2, § 3.03[A], at 3-7. More particularly, Nimmer says the relevant standard is whether a derivative work contains a “nontrivial” variation from the preexisting work “sufficient to render the derivative work distinguishable from [the] prior work in any meaningful manner.” Id. § 3.03[A], at 3-10. The caselaw generally follows this formulation. See, e.g., Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 34-35 (2d Cir. 1982)

In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008), the Court stated that the same test for originality is applicable to all works, derivative and non-derivative alike.

Patry on Copyright § 3:50 (“[T]he standard of originality for derivative works is no different than for nonderivative works.”); id. § 3:55 (“Under the Supreme Court’s Feist

opinion, there is a single test for originality applicable to all works, derivative and nonderivative alike.”)

If the original work contains no creativity or artistic judgment, then it cannot be copyrightable. If a derivative work is created from the original work, and creativity is added to the derivative work, then the derivative work would most likely be copyrightable. The opposite is also true. If the original work contains creative elements it would most likely be copyrightable. If those creative elements are removed from the derivative work, it would most likely not be copyrightable.

COPYRIGHT PROTECTION

Copyright is a form intellectual property law that protects original works of authorship fixed in a tangible medium of expression. The first copyright law was the Statue of Anne, which was enacted by the British Parliament in 1710 and pertained to the copying of books, copyright laws have dramatically expanded in what they cover.

Copyright protection in the United States includes literary, graphic, sculptural, prints, maps, globes, diagrams, charts, dramatic, musical, photographs, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. It provides the owners of the copyright exclusive rights to reproduce, prepare derivative works from, distribute, and publicly perform or display a copyrighted work, and allows “*the legal or beneficial owner of an exclusive right under a copyright . to institute an action for any infringement of that particular right.*” Copyright does not protect facts, ideas, information, discoveries, systems, or methods of operation, although it may protect the way these things are expressed. A patent protects inventions or discoveries. A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party.

In the United States, copyright protection for works created after January 1, 1978 is set to life of the author plus 70 years (See Title 17, section §§ 302(a)). For works for hire, it is 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first (See Title 17, section §§ 302(c)). A work is created when it is in a tangible medium of expression for the first time (See Title 17, section §§ 101). The author of a copyright can transfer ownership of a copyright in whole or in part, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession (See Title 17, section §§ 201(d)). The copyright in a derivative work does not affect or enlarge the scope, duration, ownership, of subsistence of, any copyright protection in the preexisting material (See Title 17, section §§ 103).

An author of a copyrighted does not relinquish their claim of copyright protection by placing their photograph on a public web site or forum. If an author takes a photograph of a coin and uses the photograph on their eBay listing of the coin, the author is not terminating their copyright protections of the photograph simply by including the photograph on eBay.

The core case law used today that defines the criteria for a work to qualify for copyright protection is *Feist Feist Publ'ns Inc., v. Rural Tel. Service C.*, 499 U.S. 340 (1991). The United States Supreme Court in *Feist* defined two requirements for a work to qualify for copyright protection: first, the work must be original to the author and independently created by the author. The second requirement is that a work must contain a minimal degree of creativity by the author.

As defined by Black's Law Dictionary, Abridged Seventh Edition, originality pertains to both, independent creation and creativity:

1 The quality of state of being the product of independent creation and having a minimum degree of creativity. Originality is a requirement for copyright protection. But this is a lesser standard than novelty in patent law: to be original, a work does not have to be novel or unique. 2. The degree to which a product claimed for copyright protection is the result of an author's independent efforts.

The subject matter of a work is not copyrightable, but the creativity and artistic judgment used in creating the work is what is copyrightable. If the subject of a photograph is an individual, copyright cannot be claimed of the individual, but the copyrightability would be toward how the individual is presented through the vision and objective in the creativity used and portrayed in the photograph. The Court stated in *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008) that:

*“[a]s applied to a photograph of a pre-existing product, that bedrock principle [of originality] means that the **photographer manifestly cannot claim to have originated the matter depicted therein** The upshot is that the photographer is entitled to copyright solely based on lighting, angle, perspective, and the other ingredients that traditionally apply to that art-form.”* Nimmer on Copyright § 3.03[C][3].

Facts and ideas are the public’s domain and open to exploitation to ensure the progress of science and the useful arts. Only original expressions of those facts or ideas are copyrightable, leaving the plaintiff in the Skyy case with an admittedly “thin” copyright offering protection perhaps only from exact duplication by others.

In *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) the Court stated that a photographer cannot prevent others from photographing the same subject matter or using the same type of creativity. The originality reflects the incremental contributions of creativity and artistic judgment in the taking of the photograph. The Court stated:

*While plaintiff’s photographs meet the minimal originality requirements in Feist, they are not entitled to broad copyright protection. Plaintiff cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors. **What makes plaintiff’s photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its “incremental contribution.”** Rockford Map Publishers, 768 F.2d at 148. Practically, the plaintiff’s works are only protected from verbatim copying. However, that is precisely what defendants did.*

If a photograph is taken of a coin, the Photographer cannot stop others from taking a photograph of the same coin. If the photograph is copyrightable, then the Photographer can normally stop others from copying their photograph.

A work is said to be in the ‘public domain’ if it is no longer under copyright protection or if it fails to meet the criteria for copyright protection (See <https://www.copyright.gov/help/faq/faq-general.html>). Works that are in the public domain may be freely copied without permission of the former copyright owner. The author of a work can permit a work to be used in the public domain by including a waiver/release with the work such as “*this photograph is in the public domain, you are free to copy items without restriction.*”

The images of United States coins are in the public domain. There has probably been over two-hundred million photographs of United States coins taken in the past two hundred years. There are no U.S. Treasury regulations regarding photographing images of U.S. coins. There is no law or case law which specifically states that images of coins are copyright protected by the United States. There is also no law or case law which states that photographs of coins are not

copyrightable. Photographs of coins, like most other entities that are photographed are subject to the same guidelines and tests in the determination if the photographs of them are original and creative, see *Feist* and *Schrock*. There are also no regulations, laws, case laws which explicitly state that a photograph of any subject in the public domain is not copyrightable. Photographs by their very nature provide a depiction of a place, person, event, or entity; this does not make them not copyrightable. The subject matter of the photograph is not copyrightable, but the artistic judgment the photographer uses in taking of the photograph is copyrightable.

Can you use a 19th century photograph and use it in a book without permission? Can you photograph a 19th century painting and use it in a book without permission? Once the copyright of a work expires, it becomes part of the public domain and can be used without permission. All copyrightable works published in the United States before January 1, 1923 are in the public domain (See <https://www.copyright.gov/circs/circ15a.pdf>). It is important to note that different countries sometimes have different laws regarding the term of copyright protection.

Some museums have attempted to claim copyright protection to reproductions of original works in their collection. The National Portrait Gallery (NPG) in the United Kingdom has over 4,000 paintings and over 6,000 works on paper. Digital images were made of the works and put on NPG's web site. In 2009, Derrick Coetzee downloaded over 3,000 of the images from NPG's website, then uploaded them to the Wikimedia Common repository on the internet. As the authors of the original images were dead for over 70 years, the images were part of the public domain. In a demand letter to Coetzee, NPG claimed that the digital images were new photographic reproductions of the original works and copyrighted in their own right due to the amount of work it took to digitize and restore them. NGPC did not sue Coetzee and the issue was not resolved. A reproduction (derivative work) of a work is copyrightable so long as there is "great skill and originality" or "substantial variation" from the original work, see *ATC Distrib. Grp.* Even though NPG claims great skill to digitize the images, the digitized images contained no originality, they were intended to be reproductions of images that were in the public domain. As seen in *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999), the Court stated that "exact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original." A reproduction of an original work that contains no new creative elements is normally considered a slavish copy and is not protectable by copyright. This has not stopped some Museums to claiming copyright protection to all images and reproduction of images.

The Photographer owns the copyright of the photograph when then depress the shutter button and creates the image. There are exceptions to this rule, for example if it is a work for hire then normally the copyright is owned by the employer. Whether a work is actually copyrightable is dependent upon the choices and artistic judgment used by the Photographer in selecting the equipment, setting the scene, posing the subject, taking the photograph, post processing of the image, and many other possible creative contributions that can be part of those elements that are copyrightable in the photograph. The Photographer does not own the copyrights of the subject matter, but of those choices and artistic judgment that create the image and reflective in the photograph.

In order to prove ownership of a work and file a copyright infringement lawsuit in Federal Court, the works must first be registered with the Copyright Office. Registration of the work is evidence of valid ownership of the copyright of the images. In *Art Rogers v. Jenn Koon*, Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540, 1992. The United States Court of Appeals, Second Circuit stated that the certification of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright, they stated:

*To establish an infringement of a copyright, a plaintiff must show both ownership of a copyright and that defendant copied the protected material without authorization. See Weissmann v. Freeman, 868 F.2d 1313, 1320 (2d Cir.), cert. denied, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989). **The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright, see 17 U.S.C. § 410(c), though that presumption of ownership may be rebutted, see Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir.1985). Protection under the copyright statute extends to pictorial works, 17 U.S.C. § 102(a)(5). For more than a century photographs have been held to be copyrightable "writings" under Article I, § 8 of the Constitution. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884) (photograph of Oscar Wilde an original work of art).***

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated what was required to prove copyright infringement. The 'original' aspect refers to those elements of the photograph that are the creative judgment and choices used to create the work:

To prove copyright infringement, a plaintiff must establish both: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548 (1985)); see also Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 290 (3d Cir. 1991).*

Copyright protection provides the owner of the work protection of the original expression of the work and provides exclusive rights to reproduce, prepare derivative works from, distribute, and publicly perform or display a copyrighted work.

CREATIVITY AND ARTISTIC JUDGMENT

The choices a Photographer uses to take a photograph are the basis of the creativity, artistic judgment, and original expression that the Photographer uses to meet their objectives and vision in their photograph. It is these choices and judgment that also forms the foundation of the elements that are protectable under the copyright laws. It is not the subject that is being photographed that makes an image copyrightable, but it is the choices and judgment in taking the photograph that is essential to the creativity element of originality. This section primarily presents the case law pertaining to the originality requirements for copyright protection of a work.

In one of the first cases involving copyright protection of photographs after the Copyright Act of 1865, *Burrow-Giles Lithographic Co. v. Sarony*, on March 17, 1884, the United States Supreme Court found that photographs were copyrightable to the extent that the photograph reflects the creative choices the author uses to take the photograph, which included the posing of the subject, selection of the costume, draperies, and other accessories, and controlling the lighting and shading. The Court stated:

The third finding of facts says, in regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same ... entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.'

These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell, as it has done by section 4952 of the Revised Statutes.

One of the core cases used today in the interpretation of copyright laws is the United States Supreme Court's decision in *Feist Publ'ns Inc., v. Rural Tel. Service C.*, 499 U.S. 340 (1991). The Court found that for a work to be original and qualify for copyright protection, it must be original to the author and was "*independently created by the author*". It also must possess a "*minimal degree of creativity*". The Supreme Court further defines the level of creativity required as "*extremely low, even a slight amount will suffice*", and that "*a work may be original even though it closely resembles other works.*" The Supreme Court stated:

To qualify for copyright protection, a work must be original to the author. See Harper Row, supra, at 471 U.S. 547-549. **Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.** 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). **To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.** The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id. § 1.08[C][1]. **Originality does not signify novelty; a work may be original even though it closely resembles other works,**

so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (CA2 1936).

The Supreme Court also stated in *Feist* that copyright protection does not extend to the subject or to creative elements of the photograph that are not original to the author, the Court stated:

accordingly, copyright protection may extend only to those components of a work that are original to the author” and “Copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original -- for example . . . facts, or materials in the public domain -- as long as such use does not unfairly appropriate the author's original contributions.

Based upon the findings by the Supreme Court in *Feist*, almost all photographs would contain some degree of creativity and be copyrightable. One exception is when a work is copied from another work, even if the new work is in a different medium such as a drawing of a photograph. If there are no creative elements added to the drawing, and the goal was to reproduce the work exactly, with the drawing reflecting the photograph, then the drawing it is not copyrightable. Another exception occurs when the human element in creating a work is removed. For example, an automated process is created to take photographs of 100 coins, the first coin is set up manually by the Photographer, all other photographs are taken automatically with no human interaction used in the taking of the subsequent 99 photographs. The first photograph is probably copyrightable, but the other 99 photographs would probably not be copyrightable. If Artificial Intelligence (AI) is used to create a work, in the United States it would not be copyrightable, whereas in some countries, the work created by AI might be copyrightable by the author of the software. Critical in the creativity and artistic judgment is the human factor in making the choices in creating the work.

Early challenges to copyright ownership of photographs included challenging that the incremental contributions of creativity were not of the Photographer, but from the subject or other sources. In *Falk v. Donaldson*, Circuit Court, S.D. New York, July 3, 1893, the defendants claim that the photograph does not represent any original creativity by the Falk. The subject, Miss Marlowe, a famous stage actress brought several costumes to Falk's studio, which Falk took 20 to 30 photographs in different positions, including those of Miss Marlowe that she also assumed on stage. The Defendants claimed that Miss Marlowe, as a trained actress, was the one who created the pose and facial expression. A witness claimed that they had seen Miss Marlowe in the exact same pose as seen in the photograph and the costume was one normally worn by the actress. The Court found that Falk's creativity in the pose and selection of costume as seen in the photograph were attributed to Falk, and therefore copyrightable, the Court stated:

The question is whether the artist was Miss Marlowe, or complainant. How far the artistic contributions are to be attributed to the talent of Miss Marlowe, is impossible to say. The testimony of the complainant as to his share in producing the result is not denied. He was an artist before he became a photographer...

There is another circumstance which points to this particular pose as the work of the complainant. It will be noticed that the position assumed by Miss Marlowe is a side view. It is one where the direction of the head and eyes is such that she could not have judged

by herself, how far to turn the body, and raise the hands, or how to incline the head, so that the lights and shadows might best reveal the beauties of face and figure. It is only necessary to examine the bundle of 15 photographs introduced by defendants to show that the pose of complainant's photographs was common among actresses, in order to see how striking poses, mechanically alike, may artistically differ....

It does not seem any more absurd that Falk should have posed Miss Marlowe than that Sarony should have posed Oscar Wilde. The notoriety of the latter depended largely upon the costumes designed, and poses assumed by him. But under the finding of facts in Burrow-Giles Lithographic Co. v. Sarony 11 U.S. 60, 4 S.Ct. 279 (1883), the court held the Wilde photograph to be an original work of art, the product of plaintiff's intellectual invention, and entitled to protection under the copyright act.

In *Art Rogers v. Jenn Koon*, Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540, 1992. The United States Court of Appeals, Second Circuit stated that elements of originality include posing the subjects, lighting, angle, selection of film and camera. The Court stated:

Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. See Burrow Giles, 111 U.S. at 60, 4 S.Ct. at 282. 1 Nimmer, § 2.08[E][1]. To the extent that these factors are involved, "Puppies" is the product of plaintiff's artistic creation

In *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000), the Court stated that there are no uniform test to determine copyrightability. The work should reflect the creative choices made by the Photographer. The originality analysis begins with the articulation of the creative choices made by the Photographer, which choices are reflected in the image created. The Court provided many examples of creative choices used and how they are reflected in the photograph. The Court stated:

Two general principles emerge from Burrow-Giles. First, an author is some-one who creates the work himself, i.e., does not copy it from someone else. Second, an author must imbue the work with a visible form that results from creative choices. In the case of Oscar Wilde No. 18, these creative choices included the particular pose (the unique features of which are recounted above in the quotation from the Hambourg book), selecting and arranging the costume, draperies, and other "accessories," as well as the lighting and shading. The combination of these choices was a "new, harmonious, and graceful picture," subject to protection. Burrow-Giles, 111 U.S. at 60, 4 S.Ct. at 282.

Nineteen years later, the Supreme Court renounced the distinction between the artistic and the ordinary in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 23 S. Ct. 298, 47 L. Ed. 460 (1903). In describing the circumstances when the requisite creativity may be satisfied, Justice Holmes wrote:

The [work] is always the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

Bleistein, 188 U.S. at 250, 23 S.Ct. at 300.

Despite the broad sweep of this paragraph, Justice Holmes was not suggesting that a mere signature, even one as distinctive as John Hancock's, is by itself copyrightable, nor

that all pictorial works are *per se* protectable. Rather, he noted that courts may reject protection for works within "the narrowest and most obvious limits" and that works are protectable when there is a "very modest grade of art." *Bleistein*, 188 U.S. at 250, 251, 23 S.Ct. at 300.

The standards to be applied in determining whether the creative spark is present can be elusive. Although photography is a species of pictorial work, see 17 U.S.C. §§ 102(a)(5), 101 (definition of "pictorial, graphic and sculptural works"), it is not defined in the Copyright Act. Thus, unlike computer programs and audiovisual works, which are defined in the Act, courts are left without congressional guidance as to what attributes of photographic works are necessary to satisfy the originality requirement.

Judge Learned Hand observed that "**no photograph, however simple, can be unaffected by the personal influence of the author**, and no two will be absolutely alike." *Jewelers' Circular Publ'g Co. v. Key-Stone Publ'g Co.*, 274 F. 932, 934 (S.D.N.Y.1921), *aff'd*, 281 F. 83 (2d Cir. 1922). Although often quoted, this statement should not be read as a comment that all photographs are *per se* copyrightable. The Supreme Court in *Feist* made clear that the originality requirement is constitutional, and that no work is *per se* protectable.

There is no uniform test to determine the copyrightability of photographs. See, e.g., *Burrow-Giles*, 111 U.S. at 60, 4 S.Ct. at 282 (**considering pose, selection and arrangement of costumes, draperies and other accessories, lighting and shading**); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (emphasizing photographer's "inventive efforts" in posing couple holding improbably numerous puppies between them, and photographic printing); *Gross v. Seligman*, 212 F. 930, 931 (2d Cir.1914) (considering pose, background, light, and shade); *Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417-18 *310 (S.D.N.Y.2000) (considering "lay-out", angles, lighting, and computer enhancements); *Kisch v. Ammirati & Puris*, 657 F. Supp. 380, 382 (S.D.N.Y.1987) (considering selection of lighting, shading, positioning, and timing).

The difficulty in identifying a common set of protectable elements may be attributable to the 19th century prejudice against the creation of works by mechanical means. This prejudice is rooted in unfounded suspicion that photographic equipment restricts creativity. See *Patry* at 252 ("As with other works created by technological means, protection for photographs has been hampered by superficial examination of the wide range of creative options available to the photographers.")

The technical aspects of photography imbue the medium with almost limitless creative potential. **For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative.**

The elements that combine to satisfy *Feist*'s minimal "spark of creativity" standard will necessarily vary depending on the photographer's creative choices. The cumulative impact of these technical and artistic choices becomes manifest in renowned portraits, such as "*Oscar Wilde 18*." The measure of originality becomes more difficult to gauge as one moves from sublime expression to simple reproduction.^[3]

Originality analysis in this case begins with Lindner's description of his creative process. Lindner carefully chose to use single light source with a "reflector to fill out the shadows" in order to "give a chiaroscuro effect that would wrap around the [the frames] and give [them] depth." (Lindner Aff. ¶ 15.) He used this lighting technique because "copy lighting" would "wash out the shadows and impart a flat look." (Lindner Aff. ¶ 15.) Lindner also employed artistic judgment in determining the amount of shadowing for each individual frame that would emphasize the detail without obscuring it. (Lindner ¶ 15.) Reflections in the mirrors also complicated the shoot and led to the creation of a "unique light design on a reflector that would appear in the mirror without showing any part of the room or [himself] in the mirror." (Lindner Aff. ¶ 16.)

As also stated in *SHL Imaging*, the only factor relevant was originality, which was based upon the incremental contribution of "precise lighting selection, angle of the camera, lens and filter selection." The Court also found that the Defendant's assertion that the Plaintiff's photographs were "accurate and precise copies of framed mirrors" had no legal significance, especially given that the Plaintiff stated that each frame required a different treatment. This strengthens the argument that those incremental contributions that require the Photographer's choices for each photograph increases the degree of contribution over if the choice was made for all photographs, the Court stated:

Defendants also seek to minimize plaintiff's creativity by describing the photographs as "accurate and precise copies of framed mirrors." Thus, they assert that the frames were "merely photographed one after another, all in the same straightforward manner faithfully to copy them to the medium of film." (Munn Aff. ¶¶ 7, 9.) The "master" photographs of the frames offered as an exhibit to defendants' expert's affidavit, present a compelling visual case that undermines defendants' arguments. (Oudit Harbhajan Aff. Ex. A.) The "master" photographs have none of the aesthetic elements that make plaintiff's photographs attractive. The gilded frames are dull and the details are obscured by shadows or overexposed.

There is no legal significance to defendants' argument that Lindner merely photographed one frame after another. Without contradiction, Lindner states that "[e]ach frame required a different treatment." (Lindner Aff. ¶ 4.) Contrary to defendants' assertion, there is no requisite amount of time necessary to create a copyrighted work; originality is the only requirement.

While plaintiff's photographs meet the minimal originality requirements in Feist, they are not entitled to broad copyright protection. Plaintiff cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors. What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its "incremental contribution." Rockford Map Publishers, 768 F.2d at 148. Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated the elements of the photograph that reflect the decisions of the Photographer are copyrightable. The Court found the photograph's copyrightable based upon the choices such as the choice of cameras to suite their

goals; choices in film based on quality; choices of lenses to achieve a desired outcome; choices in lighting to produce desired effects such as reducing shadows, portraying color, highlighting texture, or emphasizing stitching patterns; use of “bracketing” – taking multiple photographs of each piece of fabric and then choosing one based upon the expression they wanted to evoke. The sum of the choices are reflected in the images created and therefore copyrightable. The Court stated:

While there is no uniform test to determine a photograph’s originality, several factors are often cited. See, e.g., Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (taking into account pose, arrangement of subject and accessories, disposition of light and shade, and evocation of desired expression); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 (2d Cir. 1998) (emphasizing lighting and camera angle); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (holding that “[e]lements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera . . . and almost any other variant involved”); United States v. 14 Hamilton, 583 F.2d 448, 452 (9th Cir. 1978) (noting that courts “have carefully delineated selection of subject, posture, background, lighting, and perhaps even perspective alone as protectable elements of a photographer’s work”); Edison v. Lubin, 122 F. 240, 242 (3d Cir. 1903) (holding copyrightable a film made by Thomas Edison because “[t]o obtain it requires a study of lights, shadows, general surroundings, and a vantage point adapted to securing the entire effect”).

It is clear, then, that “decisions by the photographer - or, more precisely, the elements of photographs that result from these decisions – are worthy of copyright protection.” Ets-Hokin v. Skyy Spirits, 225 F.3d 1068, 1075 (9th Cir. 2000). Indeed, Learned Hand stated that “no photograph, however simple, can be unaffected by the personal influence of the author.” Jewelers’ Circular Pub. Co. v. Keystone Pub. Co., 274 F. 932, 934 (S.D.N.Y. 1921). This approach “has become the prevailing view,” and therefore “almost any photograph may claim the necessary originality to support a copyright merely by virtue of the photographer’s personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.” 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E][1], at 2-130 (2d ed. 1999).

Court holds that Plaintiffs’ photographs are sufficiently original to be copyrightable because they exhibit the requisite level of creativity. Plaintiffs’ photographers made several creative decisions that are evident in these photographs. First, the photographers chose cameras which were better suited to their expressive goals, sometimes changing cameras to produce the desired result. (Shih Dep. at 72; R. at 162, 248-50 (Aug. 23, 2004).) Second, some of the photographers decided to use certain brands or types of film because of the film’s particular qualities. (Shih Dep. at 75; R. at 250 (Aug. 23, 2004).) Third, some photographers chose specific lenses to achieve a desired outcome. (R. at 119-21, 248 (Aug. 23, 2004).) Fourth, each photographer arranged and changed lighting to produce desired effects, such as reducing shadows, portraying color, highlighting texture, or emphasizing stitching patterns. (Shih Dep. at 69; R. at 129-30, 163, 248-50 (Aug. 23, 2004).) Fifth, all of the photographers engaged in “bracketing” – taking multiple photographs of each piece of fabric and then choosing one based upon the expression they wanted to evoke. (Shih Dep. at 87-88, 143-44; R. at 165-66, 252 (Aug.

23, 2004).) In the words of Joy Shih, the decision of which picture to use was made according to "which image would project what I was trying to get [the fabric] to look like." (Shih Dep. at 87.) Moreover, the sum of these choices are reflected in the images that are at issue in this case. *Ets-Hokin*, 225 F.3d at 1075. Certain of the photographs evoke the texture of a particular fabric. Others have exaggerated or understated the tone and values of the colors in a pattern when compared to the original fabric swatches. Some photographs are more blurry than the patterns they represent, while others display an almost clinical sharpness.

Indeed, the goal of reproducing a famous work of art is an accurate replication that is faithful to the original artwork. There is no ulterior creative purpose – indeed, creativity is anathema to that goal. Plaintiffs, by contrast, did not attempt to replicate fabric swatches as precisely as possible. Rather, Plaintiffs' books were focused mainly on patterns, and Plaintiffs' photographers strove to create images that were visually interesting. In fact, several photographers clearly stated that they never compared the fabric swatches to their photographs, precisely because such a comparison was unimportant to their goals.

In *Jonathan Mannion v. Coors Brewing Company and Carol H. Williams Advertising*, No. 04 Civ. 1187, United States District Court, S.D. New York, July 21, 2005, the Court defined types of originality such as the rendition whereas the copyright protects how the subject is depicted, such as controlling the angle, light, shade, exposure, filters, and developing technique. A second type of originality can be in the timing, being in the right place at the right time. A third type of originality can be in the creation of the scene, such as seen in the multiple puppies being posed in *Rogers v. Koons*. The Court stated:

First, "there may be originality which does not depend on creation of the scene or object to be photographed ... and which resides [instead] in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc." I will refer to this type of originality as originality in the rendition because, to the extent a photograph is original in this way, copyright protects not what is depicted, but rather how it is depicted.

A photograph may be original in a second respect. "[A] person may create a worthwhile photograph by being at the right place at the right time." I will refer to this type of originality as originality in timing.

Copyright based on originality in timing is limited by the principle that copyright in a photograph ordinarily confers no rights over the subject matter. Thus, the copyright in *Catch of the Day* does not protect against subsequent photographs of bears feasting on salmon in the same location. Furthermore, if another photographer were sufficiently skilled and fortunate to capture a salmon at the precise moment that it appeared to enter a hungry bear's mouth — and others have tried, with varying degrees of success — that photographer, even if inspired by Mangelsen, would not necessarily have infringed his work because Mangelsen's copyright does not extend to the natural world he captured.

In practice, originality in timing gives rise to the same type of protection as originality in the rendition. In each case, the image that exhibits the originality, but not the underlying subject, qualifies for copyright protection.

The principle that copyright confers no right over the subject matter has an important limitation. A photograph may be original to the extent that the photographer created "the

scene or subject to be photographed." This type of originality, which I will refer to as originality in the creation of the subject, played an essential role in Rogers v. Koons and Gross v. Seligman.

By contrast, to the extent that a photograph is original in the creation of the subject, copyright extends also to that subject. Thus, an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.

In *Perfect 10, Inc., v. Amazon*, No. 06-55405, 2007, the United States Court of Appeals for the 9th Circuit stated that photographer's images were closer to the core of intended copyright protection than more fact-based works.

The nature of the copyrighted work. With respect to the second factor, "the nature of the copyrighted work," 17 U.S.C. § 107(2), our decision in Kelly is directly on point. There we held that the photographer's images were "creative in nature" and thus "closer to the core of intended copyright protection than are more fact-based works." Kelly, 336 F.3d at 820.

In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008), the Court found that the skill, effort, process, or labor does not guarantee copyrightability. The originality is based upon the original depiction of the subject. The final product should reflect the creative choices made in the creation of the work.

But, in assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability. See Feist, 499 U.S. at 359-60; Howard B. Abrams, Law of Copyright § 2:8 ("Even if the process is both expensive and intricate, an exact or near-exact duplicate of an original should not qualify for copyright.") (emphasis added); Wojcik, supra, 30 Hastings Comm. & Ent. L. J. at 267 ("This is not to say that [accurately reproducing an underlying image] requires no skill or effort; it simply means that such skill and effort does not suffice to invoke the highly advantageous legal monopoly granted under the Copyright Act. ").

"[a]s applied to a photograph of a pre-existing product, that bedrock principle [of originality] means that the photographer manifestly cannot claim to have originated the matter depicted therein The upshot is that the photographer is entitled to copyright solely based on lighting, angle, perspective, and the other ingredients that traditionally apply to that art-form." Nimmer on Copyright § 3.03[C][3].

Accordingly, the Court indicated, photographs are copyrightable, if only to the extent of their original depiction of the subject. Wilde's image is not copyrightable; but to the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to "owe their origins" to the photographer, making the photograph, at least to that extent.

In *Daniel P. Schrock, d/b/a Dan Schrock Photography vs. Learning Curve International, Inc., RC 2 Brands, Inc., and Hit Entertainment* No. 08-1296, 2009, the Court of Appeals for the Seventh Circuit stated regarding copyrighted photographs and requirements for originality:

*Federal courts have historically applied a generous standard of originality in evaluating photographic works for copyright protection. See, e.g., Ets-Hokin, 225 F.3d at 1073-77; SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 305 (S.D.N.Y. 2000). In some cases, the original expression may be found in the staging and creation of the scene depicted in the photograph. See, e.g., Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005). But in many cases, the photographer does not invent the scene or create the subject matter depicted in it. **Rather, the original expression he contributes lies in the rendition of the subject matter—that is, the effect created by the combination of his choices of perspective, angle, lighting, shading, focus, lens, and so on. See id.; Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (“Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”).** Most photographs contain at least some originality in their rendition, see Mannion, 377 F. Supp. 2d at 452 (“Unless a photograph replicates another work with total or near-total fidelity, it will be at least somewhat original in the rendition.”), **except perhaps for a very limited class of photographs that can be characterized as “slavish copies” of an underlying work, Bridgeman Art Library, Ltd. v. Corel Corp., 25 F. Supp. 2d 421, 427 (S.D.N.Y. 1998) (finding no originality in transparencies of paintings where the goal was to reproduce those works exactly and thus to minimize or eliminate any individual expression).***

Also, as seen in *Schrock*, in determining copyright protection, the purpose of the photograph is irrelevant, the primary criteria for copyright protection is the original expression added. The Court stated:

*Learning Curve and HIT offer two additional reasons why we should conclude that Schrock’s photographs are not original. First, they claim that the photos are intended to serve the “purely utilitarian function” of identifying products for consumers. **The purpose of the photographs, however, is irrelevant. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903); SHL Imaging, Inc., 117 F. Supp. 2d at 311 (“That the photographs were intended solely for commercial use has no bearing on their protectability.”).***

After the Copyright law was amended in 1865 to include photographs and the first litigation regarding photographic copyrights (*Burrow-Giles Lithographic Co. v. Sarony*), the Courts have clearly interpreted the criteria for copyright protection for photographs. This includes that the author created the work independently and that the work contains a level of creativity or original expression through the creative choices and artistic judgment used in the creation of the work. Even though there is no specific test to establish copyrightability, the Courts have provided many examples to help provide a guiding principle. The start of the analysis of originality begins with the author articulating the choices made, which are also reflected in the work created. Almost all photographs by their nature would be copyrightable, but there are a few exceptions, such as with slavish copies.

SLAVISH COPIES

Slavish copies are normally defined as a photo of a photo, Nimmer on Copyright (“A photograph of another photograph that amounts to nothing more than slavish copying lacks the requisite originality to qualify for protection”). This concept applies to all works, whether it is in the same medium or different. For example, a drawing of a photograph, whereas the objective of the drawing is to copy the photograph exactly. If no new creative elements are added to the drawing, then there is no original expression added to the drawing, therefore the drawing is not copyrightable. In addition, in a work that copies another work exactly, it would also be copying the creative elements of the original photograph and most likely be an infringement of the original photograph’s copyrights.

Of course, if a work is copied from another work, and the author of the original work is also the author of the new work, then the new work is simply a derivative of the original work and the new work copyrightable the same as the original work. The derivative work retains the time frame of copyright protection of the original work, it does not extend or change it.

For a new work that is a copy of an original work by a different author, for the new work to be copyrightable, it must not copy the creativity used in the original work without permission of the author of the original work. The new work must include its own creative elements that are copyrightable and have taken great skill to create or be a substantial variation of the original work.

In *ATC Distrib. Grp. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712 (6th Cir. 2005), whereas hand drawn sketches were made from photographs of transmission parts with the objective of duplicating the transmission parts exactly with no new creative elements added to the hand drawn sketches, then the hand drawn sketches were not copyrightable. In addition, if a work takes great skill (“mere sweat of brow”), but contains no originality, then it is not copyrightable. The Court stated:

A reproduction of a work of art or photograph in a different medium is copyrightable in principle, if it involves “great skill and originality,” Alva Studios, Inc. v. Winninger, 177 F.Supp. 265, 267 (S.D.N.Y.1959), or “substantial variation, not merely a trivial variation such as might occur in the translation to a different medium,” L. Batlin & Son v. Snyder, 536 F.2d 486, 492 (2d Cir.1976). Mere “sweat of the brow,” however, is insufficient to render a copy eligible for copyright protection. Feist, 499 U.S. at 352-61, 111 S.Ct. 1282. Nor is the mere demonstration of physical skill or special training. L. Batlin & Son, 536 F.2d at 491.

*The illustrations were intended to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality. See J. Thomas Distribs., 100 F.3d 956, 1996 WL 636138 at *1 (“Plaintiff’s spindle bearing was drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing. Its reproduction involved absolutely no creative spark whatsoever.”).*

In *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999), the Court stated that because color transparencies of paintings lacked originality, they were not copyrightable. Originality is one of the primary requirements for copyright protection; a work

must contain minimal degree of creativity in order to be copyrightable. If an exact copy is made of an original work, then there are no new creative elements added to the new work, which would make it copyrightable. The second requirement is that a work be independently created by an author. If a work is in the public domain, it means that the work is not copyrightable or that the copyright protection for a work expired. If an exact copy of a work in the public domain is made, the author cannot claim to have created the work. If a copy of work contains new creative elements and either great skill was used or there is substantial variation in the new work, then it may be copyrightable. The Court stated:

As the Nimmers have written, there "appear to be at least two situations in which a photograph should be denied copyright for lack of originality," one of which is directly relevant here: "where a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying." The authors thus conclude that a slavish photographic copy of a painting would lack originality

color transparencies of paintings which themselves are in the public domain -- were not original and therefore not permissible subjects of valid copyright

The Court's prior opinion indicated that plaintiff's exact photographic copies of public domain works of art would not be copyrightable under United States law because they are not original.

*In this case, plaintiff by its own admission has labored to create "slavish copies" of public domain works of art. While it may be assumed that this required both skill and effort, there was **no spark of originality** -- indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.*

Is it possible for ATC to have created hand drawn transmission parts from the photographs that were copyrightable? If ATC had added creative elements to the hand drawn sketches, such as patterns then it is possible that the hand drawn sketches would have possibly been copyrightable. If *Bridgeman Art Library* added creative elements to the color transparencies, such as additional creative objects to the color transparencies of the paintings, then they would have possibly been copyrightable.

If a new work is copied from another work, the new work is copyrightable so long as it involves "great skill and originality" or "substantial variation." The creative element to a work is what is copyrightable, therefore even if there is substantial variation, it must also contain originality to be copyrightable. In analyzing several variations:

- a. If the new work simply copies another work and adds no new creative elements or artistic judgment, then it is basically a slavish copy and not copyrightable.
 1. This includes if the new work is simply in a new medium.
- b. If the new work copies copyrightable creative elements of the original work without permission of the author of the original work, then it could possibly be a copyright infringement of the original work.
- c. If the new work copies copyrightable creative elements of the original work with permission of the author of the original work, then:
 1. If there are no creative elements added to the new work, the new work is not copyrightable.

2. If there are creative elements added to the new work and it takes great skill to copy, the new work is possibly copyrightable.
3. If there are creative elements added to the new work and the new work is a substantial variation from the old work, then the new work is possibly copyrightable.
- d. If the original work has no creative elements that are copyrightable or the time has expired on the copyright protection of the original work, then:
 1. If there are no creative elements added to the new work, the new work is not copyrightable.
 2. If there are creative elements added to the new work and it takes great skill to copy, the new work is possibly copyrightable.
 3. If there are creative elements added to the new work, and the new work is a substantial variation, the new work is possibly copyrightable
- e. If the new work is based upon the original subject used in the original work, then the original work is irrelevant and the new work is judged upon those creative elements used in creating the new work.

In *Andrew Paul Leonard, d/b/a APL Microscopic vs. Stemtech International Inc*; Nos. 15-3198& 15-3247; August 24, 2016, the United States Court of Appeals for the Third Circuit, Leonard obtains cell samples from doctors, scientists, and researchers and pays a scientific research institution to use an electron microscope to photograph the cells. The images first appear in black and white, and Leonard uses his “*artistic judgment*” to enhance the photos in color. If a copy of the photograph is made in Black and White, and new lines were added to the cells to provide dimension or other background features were added, then it is possible that the copied photograph would be copyrightable and not be an infringement of the original photograph.

A slavish copy is simply an exact copy of another work with no new creative elements added to the new work, which is therefore not copyrightable.

WORKS THAT LACK CREATIVITY

If an author makes an exact copy of another work (slavish copy), and there is no originality or creativity in the new work, then the new work is not copyrightable. The same is true if an author creates an original work and if no creative elements were used in the creation of the work, then it is not copyrightable.

In an unpublished opinion, *J. Thomas Distribs., Inc. v. Greenline Distribs., Inc.*, No. 95-cv-2100, 1996 WL 636138, (6th Cir. Oct. 31, 1996), whereas great skill and labor might have been used to create the drawing, there was no creative elements used in its creation, the objective was to reproduce the image of spindle bearing exactly and no original expression added, therefore it was not copyrightable. The Court stated:

spindle bearing was drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing. Its reproduction involved absolutely no creative spark whatsoever.

An example of elements that could be added to create creative elements might be to add color or patterns to the drawing of the spindle bearing or add a background to the drawing such as a spindle bearing sitting on the beach. If this was a photograph of a spindle bearing, creativity might be added through the adjusting the lighting or shading, angling the spindle bearing to adjust the perspective, putting the spindle bearing with decorations to set up a specific scene.

The general objective of a photograph is to capture the image of a subject or scene. The exact appearance of the subject is normally different from the photograph of the subject based upon the influences and choices of the Photographer and the equipment they use. In Ansel Adams' book, *The Camera*, he states “*Even the most realistic photograph is not the same as the subject, but separate from it by the various influences of the photographic system. The photographer may choose to emphasize or minimize these “departures from reality,” but he cannot eliminate them.*”

The majority of photographs taken in this day and age display their creative nature in their timing or posing of the subject. For example, capturing action shots at a sporting or other event, special moments, posing of family and friends. Another major category of photographs that include places we visit and things we do, such as on vacation. Photographing historic places, mother nature at her finest such as mountains, flowers, waterfalls, and wildlife we encounter.

The creative elements we use to photograph these subjects normally involve choices such as positioning ourselves to improve the lighting, zooming the lens to choose what parts of the subject are captured in the photograph and their proportional size. There are endless choices that can be used that can affect and alter our photographs. These choices in creating our photograph is what is protected under the copyright laws.

What if the subject of the photograph is a simple inanimate object such as a bottle, chair, spoon, coin, or a common auto part such as a tail-light? Can photographs of these objects be copyrightable? The answer is yes, so long as there is creativity in the taking of the photograph, such as choices of lighting, shading, posing of the subject, selection of camera and lens, and such choices that reflect the vision of the Photographer.

If the objective of the photograph is to replicate exactly the image of the subject, whereas creative choices are specifically avoided to capture the image of the subject exactly, then there is nothing in the work except for the exact image of the subject. Under these circumstances, there is no copyright protection for the work as there was no creative elements used in the creation of the work.

In *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, Plaintiffs alleged Defendants created photographs, which are direct depictions of common Chinese food dishes, which the Court found lacked the creative element that would render them original works. Part of this analysis by the Court was the description of the creativity used and the photographs reflecting those creative elements. The Plaintiff could not describe how any artistic judgment was used and there was no differences reflected in the photographs. The Court also found that the Plaintiff failed to show that the Defendant copied the Plaintiff's photos.

The photographs, as noted supra, are direct depictions of the most common Chinese food dishes as they appear on the plates served to customers at restaurants.

plaintiffs fail to describe how the photographs were taken, or how they were incorporated into the copyrighted design as a whole. While Ngan states that he worked with a photographer on the "lighting" and "angles," he provides no description of either the lighting or angles employed, or any desired expression. From the exhibits submitted, both the lighting and angle appear to be equivalent in every photograph. Finally, it is clear that the photographs at issue were not designed with creativity or art in mind. Rather, plaintiffs' photographs serve a purely utilitarian purpose: to identify for restaurant customers those dishes on a take-out menu, such that the customers may achieve a better understanding of what a particular dish contains.

*The Court finds that this is the rare case where the photographs contained in plaintiffs' work **lack the creative or expressive elements** that would render them original works subject to protection under the Copyright Act. The **photographs lack any artistic quality**, and neither the nature and content of such photographs, nor plaintiffs' description of their preparation, give the Court any reason to believe that any **"creative spark" was required to produce them**. The photographs, as noted supra, are direct depictions of the most common Chinese food dishes as they appear on the plates served to customers at restaurants.*

To add a creative element to the images of the Chinese food dishes, the image might have been enhanced to add patterns or pictures to the plates or perhaps created a background to the plates to stage a scene the plates are seen in.

In *Custom Dynamics, LLC v. Radiantz LED Lighting, Inc.*, 535 F. Supp. 2d 542, 549 (E.D.N.C. 2008) the Eastern District of North Carolina denied copyright protection of photographs of after-market motor-cycle lighting accessories, which were simply a purely descriptive photograph of a product and contained no creative work with some minimal level of originality. To permit copyright protection of a general public domain product would permit the copyright protection to be extended to the image of the subject. Copyright does not protect the image of the subject matter, it protects the originality in the creation of a work. The Court stated:

If Custom is claiming a copyright in the ability to show product-description photographs and technical details of aftermarket motorcycle lights in general, Custom's claim is weak because it is essentially an attempt to copyright an idea. "Although copyright protects against more than literal' copying . . . it does not afford an exclusive right to ideas. . . ." Robert A. Gorman, Copyright Law 24 (2d ed.2006).

Where an asserted copyright is too generalized, it is essentially an impermissible attempt to copyright an idea. See, e.g., Ale House Mgt., Inc. v. Raleigh. Ale House, Inc., 205 F.3d 137, 143 (4th Cir.2000).

"The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author." Feist Publ., 499 U.S. at 345, 111 S.Ct. 1282. To be "original," every work must "possess[] at least some minimal degree of creativity?" Id. The Supreme Court has described this bare minimum requirement as "some creative spark" Id. However, there is no "creative spark" involved in a purely descriptive picture of a product.

plaintiff may not corner the Market on advertising aftermarket motorcycle lighting accessories by copyrighting purely descriptive pictures of its wares. See id. at 548 (noting that to hold otherwise "effectively would permit [plaintiff] to monopolize the market").

Custom's photographs Were meant to serve the purely utilitarian purpose of displaying examples of its product to potential consumers, and do not merit copyright protection.

In *Darden v. Peters*, 488 F.3d 277, 286 (4th Cir. 2007), the Court affirmed the Copyright Office refusal to register Darden's changes and additions to the standard census maps were insufficiently original or creative to be copyrightable. Original expression does not include: adding familiar shapes, symbols, and designs; mere variations of typographic ornamentation, lettering, fonts, or coloring; adding words and short phrases such as names, titles, and slogans; or listing of ingredients or contents.. The Court stated:

In developing his website, Darden hired Sean Pecor, a web designer, to create the maps. Pecor started with a digital Census map of the United States, colored the map blue, and added shading to give the map a three-dimensional effect. Pecor selected a font to use in labeling the states, and he added call-out labels as well. Pecor used the same process for the individual maps of each state.

*Darden described APPRAISERSdotCOM as a derivative work based on "US Census black and white outline maps" and "clip art." J.A. 125. Darden's **application identified "graphics, text, colors, and arrangement" as the material that he added to the preexisting work and in which he claimed copyright protection.***

The Examining Division of the Copyright Office rejected both applications. With respect to Darden's claim in the Maps themselves, the examiner concluded that the work "lack[ed] the authorship necessary to support a copyright claim." J.A. 119. The examiner explained that "[i]n order to be copyrightable, a work of the visual arts must contain a minimum amount of pictorial, graphic, or sculptural authorship" and that "[c]opyright does not protect familiar shapes, symbols, and designs . . . [or] mere variations of typographic ornamentation, lettering, fonts, or coloring." J.A. 119. The labeling, relief, shadowing and shading that Darden contributed to the preexisting maps, the examiner concluded, are standard elements that do not contain copyrightable authorship.

The Copyright Act affords copyright protection for "original works of authorship fixed in any tangible medium of expression," including "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5). ... The Copyright Office established a regulation providing examples of the types of works that fall into the category of works that lack a minimum level of creativity and do not qualify for copyright protection, including "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents." 37 C.F.R. § 202.1(a).

the Copyright Office explained that the changes and additions Darden made to the standard census maps in his Maps work claim were uncopyrightable elements that were insufficiently original or creative to be copyrightable. See Satava v. Lowry, [323 F.3d 805](#), 812 n. 5 (9th Cir.2003) (noting that "expressions that are standard, stock, or common to a particular subject matter or medium are not protectable under copyright law"). Additions to the preexisting maps such as color, shading, and labels using standard fonts and shapes fall within the narrow category of works that lack even a minimum level of creativity; indeed, Darden's contributions to the preexisting maps resemble the list of examples of uncopyrightable works set forth in 37 C.F.R. § 202.1(a).

For photograph, if text is added as part of post-processing, this would normally not be a creative element that would qualify for copyright protection. Text, names, and labels are more factual in nature and not artistic. But the addition of color in post-processing software has qualified as a creative element for a photograph, see *Leonard*. Several Courts have also stated that the use of shading in the taking of photograph was a creative element that deserves copyright protection, see *SHL Imaging*, *Schrock*, and *Burrow-Giles*. Perhaps as maps are less expressive and changing of elements such as coloring, or shading does much less in enhancing the original expression as it does in a photograph. If you look at a map, you seeing locations and places; how much does the color affect how it is seen? Changing the color or shading of a photograph changes the expression and depiction of how the subject is seen through the Photographer's vision.

In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008) (Gorsuch, J.) denied copyright protection to "digital wire-frame computer models" that simply depicted the unadorned vehicles. The Court found that there was no creativity/artistic judgment which would have fulfilled the original expression requirement. The Court stated:

*we hold that the unadorned images of Toyota's vehicles cannot be copyrighted by Meshwerks and likewise must be filtered out. To the extent that Meshwerks' digital wire-frame models depict only those unadorned vehicles, **having stripped away all lighting, angle, perspective, and "other ingredients" associated with an original expression**, we conclude that they have left no copyrightable matter*

What would make the images in *Meshwerks* copyrightable? The Court answered that question themselves, providing hypothetical examples what might make these image copyrightable:

Key to our evaluation of this case is the fact that Meshwerks' digital wireframe computer models depict Toyota's vehicles without any individualizing features: they are untouched by a digital paintbrush; they are not depicted in front of a palm tree, whizzing down the open road, or climbing up a mountainside. Put another way, Meshwerks' models depict nothing more than unadorned Toyota vehicles – the car as car.

Take the common scenario now of using your computer to generate snapshots of the image on the computer screen. Would the generated image be copyrightable? The answer would more than likely be no. The generated image is simply an exact duplicate of the image on the screen at a given time. This might be considered a reproduction of the image of the screen with no skill or substantial variation of the original image. The objective of creating a snapshot is also to duplicate to image of the screen exactly, therefore there is no creative spark. There is no incremental contributions to the artistic judgment by the individual taking the screen snapshot, the individual simply presses the Print Screen button and replicates the image of the screen.

In order for a work to qualify for copyright protection, it must include a minimal degree of original expression and creativity. Works that just copy a subject without any creative choices or artist judgment will not be copyrightable.

AI AND ALGORITHM GENERATED IMAGES

Can a computer generate an image that is copyrightable? If the image generated by a computer was copyrightable, then who would be the author and owner of the copyright, would it be: the person who wrote the software; the person who ran the software; the person who created the data that the software relied on; the computer itself; or the company who owned the computer? What if multiple people designed the algorithm or based in part on logic and code derived from other algorithms? Are simulated creativity, choices, and judgment the same as what humans would use in a creating a work and would an algorithm based creation be protectable under the copyright laws?

Computers have evolved significantly since their conception in the 1940s. The algorithm is the set of rules, logic, and decision making capability programmed into the computer. The hardware consists of the physical devices of the computer such as memory, motherboard, input/output devices, cables, hard drive, extraneous boards, and such. Hardware devices can be programmed through software device drivers or the logic can be controlled through logic encoded onto the devices themselves. For example, Analog to Digital converters can convert the frequency or amplitude modulation analog signals to a digital signal through a hardware evaluation of the analog signal and producing the corresponding digital signal.

When thinking of a computer algorithm, most individuals would immediately identify this with software. Software is a program that normally runs in the computer's memory. The program is a set of source code that controls the logic and decision making of the program. The software can be used as a tool to accomplish tasks such as data analysis, mathematical equations, drawings, games, communications, robotics, and almost an unlimited number of other jobs or objectives.

What is intelligence? Intelligence is defined in part as the ability to: learn or understand through experiences; acquire and retain knowledge; respond quickly and successfully to a new situation; use reason in resolving problems. As humans, we primarily learn and adapt through experiences and being taught by those who have already acquired knowledge. Part of our learning can be attributed to curiosity and trial and error. We learn for example that a fire is hot when we touch it and can cause pain. To solve new problems and situations, we sometimes adapt and apply reasonable logic to overcome issues. Imagine cavemen who found how fire can make them warm but also permits them to see better at night, adapting on how to carry fire on torches. There is the side of our brain that is more creative in nature that we use write poetry, music, and draw works for art for example. Sometimes these works are based upon our feelings such as our passion, love, anguish, fear, and other emotions.

Starting around the 1970s, computers advanced to be able to create basic works of art. The software would be heavily dependent upon the specific code written by the programmer. The software code would specifically control the movement of the pen in drawing the art. The code became the tool that controlled the brush in the same way as our hand held a brush. The code did not learn or adapt, it simply followed instructions through the code. In a pure sense, the programmer of the code would be the owner of the image created as they designed and caused it to be specifically created in an exact way. This does not mean that the image created was copyrightable, to be copyrightable, the work must be independently created and also contain

creative and artistic choices. Rerunning the same software program a second time, would normally create an exact duplication of the first work, making this more of a process and not a creation through choices.

Today, some computers have moved towards artificial intelligence (AI). These are systems that are capable of learning from data and rules and creating new logic and rules for decision making, without being specifically programmed or taught by a human. Machine learning software is software that can “learn” from data input and creates a new set of rules or logic to follow. For example, an artist creates a hundred different paintings. These painting are scanned, digitized, and used as input to a program. The program evaluates the paintings to study and understand the style of the artist through their use of: colors; shading, focal points; direction, thickness, depth of brush strokes; symmetry; background; balance; proportions; and other attributes. Then using the rules learned from the paintings, draw a new painting using the artist’s look and feel. AI has also been used to write books, compose music and other creative works that are normally associated with human intelligence and creativity.

The author has been a software engineer for over 30 years. In the 1990s, he was working for a company that primarily provided spell checking functionality. He was tasked with hyphenating several different languages and also compressing the Russian language from three million words down to three hundred thousand. The author wrote what he called Adaptive Learning Systems (ALS). For the hyphenator, the input was the complete list of words for a language, generic rules of hyphenation, and the alphabet broken down to phonetic groups such as: hard consonants; soft consonants; vowels; and also a list of prefixes and suffixes. The algorithm analyze each word, using the general hyphenation rules, phonetic attributes, prefix, suffixes to hyphenate the word, capture the letter combinations that formed the rules, and those groups that were exceptions. These patterns and exceptions would become the specific rules for hyphenation for that language, especially focusing on exceptions, which sometimes required manual verification and adjustments. The Russian language compression involved searching for patterns to remove for example common beginnings or ending of words and tagging them accordingly. The algorithm took into consideration the time to find tagged words and went through many deviations and combinations of patterns tagged to find the optimal solution. These were learning systems as they learned and created patterns and rules based upon the words and phonetics of the language. They also sought the optimal solutions with an emphasis on time. These accomplish the same basic principles of AI, but at a much simpler implementation than other algorithms such as those analyzing painting and creating new art works.

Perhaps the term Artificial Intelligence implies too much of those human qualities that define us. A computer can be taught/programmed to learn from a set a rules/data. Then apply what it has learned to create something such as a painting or music composition. But one of our greatest human qualities is our emotions and feelings. For example, take a new car. Both the human and computer can be taught to analyze the features and attributes of the car. What about the aesthetics of the car, how does it look and feel? Five different individuals might have different opinions on why they like how a car or anything looks. An algorithm might be able to simulate this concept by studying statistics and feedback from consumers, but it cannot make this choice on its own. Perhaps at the current state of AI, a better term would be Simulated Intelligence. The algorithm is simulating what it has learned from the rules and data that were input. For

example, it simulates the brush stroke of an artist after studying the artist's work. Perhaps this is why in part there is a struggle to offer copyright protection to works created by an AI algorithm.

On the other side of the coin so to speak, humans learn primarily through experiences and being taught by others. It can be argued that Computer algorithms learn in a similar way, through data sets and rules they learn how to emulate and create. But of course, the new rules and decision processing is based upon a fixed set, not an unlimited set of choices that humans might be able to choose from. What intelligence and learning implies can be a very broad spectrum and can include simple to complex definitions. Artificial Intelligence might be more appropriate if the definition is towards the emulation from what it has learned from the data and rule inputted. The data and rules are critical to the algorithm learning, and therefore add another layer of a possible "author" to the creation through AI of a work.

Humans have believed that qualities such as creativity, imagination, inventiveness, and sensitivity were more human in nature and not seen through AI. These distinguishable characteristics and traits have been eroding between humans and AI, especially over the past twenty years. This is especially true if you compare the works generated by humans and computers, it is getting more difficult to determine if they were human or computer created.

If AI is used to generate a work of art, then should that work be copyrightable and who would own the copyrights? It is obvious that AI can be used to generate a work of art that can be said to be comparable to or even better sometimes than human work. In theory then, an AI generated work should qualify as a creative work.

The issue of whether an AI generated work should be copyrightable has not been directly addressed by U.S. Courts. In *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008) (Gorsuch, J.) the Court denied copyright protection to "digital wire-frame computer models." The Court found that there was no creativity/artistic judgment which would have fulfilled the original expression requirement. The Court stated:

we hold that the unadorned images of Toyota's vehicles cannot be copyrighted by Meshwerks and likewise must be filtered out. To the extent that Meshwerks' digital wire-frame models depict only those unadorned vehicles, having stripped away all lighting, angle, perspective, and "other ingredients" associated with an original expression, we conclude that they have left no copyrightable matter

This decision did not address the concept of a computer generated image, but found that the work simply copied the unadorned vehicle, and therefore lacked creativity.

The Singapore's Court of Appeals addressed copyrightability of AI generated images in its decision in *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* ("Asia Pacific Publishing"), The Court presented two key principles relating to authorship in copyright.

1. In order to establish copyright protection for an original work, a human author must be identified as the creator of the work.
2. Only a human can qualify as an author. A company cannot. The reasoning for this is to prevent a non-human entity from holding a copyright forever. Copyright protection is

normally limited to the duration of the author's life plus 70 years. This ensures that the work will not be unreasonably kept out of the public domain by a perpetual monopoly.

The Singapore Court of Appeal's stated that "*not infrequently, in cases involving a high degree of automation, there will be no original work produced for the simple reason that there are no identifiable human authors*".

This is similar to rules and standards for copyright protections granted in the United States. The United States Copyright Office states "*register an original work of authorship, provided that the work was created by a human being.*" The United States Supreme Court stated in *Feist* that to qualify for copyright protection, a work must be original and independently created by the author and possesses at least some minimal degree of creativity. The Supreme Court also stated that that copyright law only protects "*the fruits of intellectual labor*" and "*are founded in the creative powers of the mind.*" The Court also indicated in *Feist*, "*sweat of the brow*" alone is not the "*creative spark*" which is the sine qua non of originality. The Court stated in *Meshwerks* when a computer-generated image of a car was created that: "*But, in assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.*" With automation of a process, there is less creative judgment and choices that are made, which are the incremental contributions for copyright protection.

Other countries have also denied copyright protection for works not created by a human. In *Acohs Pty Ltd v Ucorp Pty Ltd*, an Australian court denied copyright protection for a work not created by a human. The Court of Justice of the European Union stated in its *Infopaq* (C-5/08 *Infopaq International A/S v Danske Dagbaldes Forening*) decision, that copyright only applies to original works, and that originality must reflect the "*author's own intellectual creation.*" This implies that an original work must reflect the author's expression, which means a human author is required.

We normally use computers and software every day to perform different functions. We also can use them to assist us in creating works such as poetry. For example, while writing a poem in Microsoft Word, we might want to use Word to find words that rhyme, synonyms, antonyms, spell, or grammar check the poem. Other examples include using software to edit a photograph, draw art, compose music, to name a few of the endless list that we use computers to assist us. Does doing more using computer tools make the origin more from a computer than a human? In scenarios where the human is driving the choices and judgment, then the computer is still a tool to accomplish a task. If the human element is removed such as through automation and AI, then the origin is more towards the computer. It may be argued that a human wrote the software that drove the algorithm; which makes the choices or entered the data that drove the creation of rules, but these interdependent elements help assist the computer in making choices, but true AI moves more towards machine learning and the computer making the choices and decisions with the options beyond the scope of the data input, which removes the human element. The grey area comes in when there is interactive direction from the human to the computer and how much choice and judgment is made by the human.

Most case law that that pertain to whether a work is copyrightable state requirements such as original expression, creativity, and artistic judgment. For AI and computer generated works, the computer is following an algorithm it was programmed or processing a set of data and rules, then possibly creating new rules from the data and apply them to create a work. If the basis of the data analysis algorithm is absolute and the data is absolute, which forms the basis of the new rules, then it can be argued that the resulting algorithm is not based upon originality as it cannot 'think' outside the rules generated from the data inputted. What happens though when AI evolves to the point beyond making decisions based upon algorithms and data sets and moves more towards evaluating and learning from every day inputs as humans do? If computers are taught to understand psychology and philosophy, or to become fluent in natural language generation, does this raise their ability in creating creative works of art or literature for example?

Another consideration is that if you requested an artist to paint the same scene ten times, it is more than likely that something will be different with each painting. If you requested an AI algorithm to generate the same painting from the same data set input, it is more likely they will all be the same. If choices and judgment formulate the basis of copyright protection, how can a process which does the exact same sequence every time be based upon choices and judgment?

If the programmer can be the author of the software code and protected as a form of literary work, can the user who runs the software be the author of the output produced by the software? As shown in the example above, if ten different users ran the same software and generated the same painting, should copyright protection be provided to each of the users? The answer is obviously no. If the same output was generated, then it is more likely they allowed the computer to do most of the decisions. If ten different outputs were created by ten users, then they would more likely be original, depending upon how much interaction and choices each user made.

As the author of the software code, does their contribution to the algorithm permit them partial ownership of the output generated? This again brings up the dilemma in computer-generated software on who the owner is, and all of the legal implications and complexities that would be involved in resolving issues related to the claim of ownership, liability, and stopping others from infringing. Is there a relationship between the code and the output? If the output for example is claimed to be infringing on another work, does the infringement go back to the code and the programmer who generated it? For example, let's say that that a programmer borrows some of the general logic of his code from code in the public domain. The code generates output that infringes on another work. Does the code in the public domain become liable in part because their code was used to create part of the work? What if a programmer expands code generated by another and there an infringement claimed on the output generated? Does the single or multiple parties who developed the code become liable?

The problem with not permitting AI or computer generated works to be protected in some manner is then they can be copied without legal recourse. This can tend to stagnate research and development into AI systems as the companies would not be able to protect their works created for example in the generation of video games.

Perhaps an optimal solution is to create an alternative set of laws which govern some type of protections on AI and machine generated works, which do not require a human author be

identified to prove originality and claim copyright ownership. This would create incentive and safeguards for the individual or company to invest in this technology and insure protections. There would still be issues to resolve such as is the author/owner the: creator of the software/algorithm; person who researches and creates the data input and rules; user who runs the program; company; multiple individuals who contributed; or someone else? Is the time limit for the copyright protection set accordingly to align with normal copyright protection and not indefinite?

Some countries have already revised their copyright laws to incorporate AI and machine generated output. Several have chosen to give authorship to the programmer who created the algorithm such as the Hong Kong, India, New Zealand and the UK. For example, under United Kingdom copyright law, section 9(3) of the Copyright, Designs and Patents Act (CDPA) states:

“In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”

In the numismatic (coin) hobby there are third party grading services which offer grading of coins. One of the service attempted to create an automated system for grading coins through computers. Analyzing the surfaces, strike, and other characteristics of a coin. The one perspective that could never be taught to the computer is the aesthetics of a coin; how beautiful it appeared, which is one of the most important qualities of a coin. As the saying goes, beauty is in the eyes of the beholder, which implies that every individual may find different qualities of coins more aesthetic. How can you write an algorithm to understand and evaluate this essential criteria?

In the United States, our current copyright protection laws apply only to works created by humans and not to AI and computer generated algorithms and programs. These laws require a human author who created the work and also that the work contain a minimal degree of creativity and original expression. With AI constantly evolving and becoming more able to learn and make decisions without user interaction, we will need to adapt our laws accordingly.

Sometimes we use our imagination when we see an image. We look beyond the factual representation of a subject. The photograph to the right is of a flame in a fire. The creative nature of our mind can take us to see something in a different perspective. For example, first thought was the appearance of modern architecture two towers holding up a roof, looking closely at the top looks like a jellyfish or perhaps a mushroom. Two people can be imagined in the bottom flame, one on their back with two hands held up, another kneeling with their head up and hands forward. You can probably teach a computer to do image comparison, but this is not the same as a creative imagination.



ANALYSIS OF ARTISTIC JUDGMENT IN TAKING PHOTOGRAPHS

There are two primary elements required for a work to qualify for copyright protection: 1. The work must be original to the author and independently created by the author. 2. The work must possess a minimal degree of creativity. Some of the more commonly used caselaw pertaining to the determination of copyrightability are as follows. The United States Supreme Court defines the level of creativity required as extremely low, even a slight amount will suffice, see *Feist*. The image of the subject is not copyrightable, but the original depiction of subject, which reflects the photographer's decisions and judgment in creating the photograph is copyrightable, see *Meshwerks*. The decisions by the photographer - or, more precisely, the elements of photographs that result from these decisions are copyrightable, see *Schiffer Publishing Ltd.* Most photographs contain at least some originality in their rendition, such as the effect created by the combination of their choices, such as perspective; posing of subject; angle; lighting; shading; focus; selection of film; camera; lens; selecting the desired expression; and so on. In some cases, the original expression may be found in the staging and creation of the scene depicted in the photograph, see *Rogers v. Koons*. Sometimes the creativity is found in the timing of the photograph, such as with wildlife photography, see *Jonathan Mannion v. Coors Brewing Company and Carol H. Williams Advertising*. There is no uniform test to determine a photograph's originality, see *Schiffer Publishing Ltd.* The elements that combine to satisfy Feist's minimal "*spark of creativity*" standard will necessarily vary depending on the photographer's creative choices. In sum, copyright protection is only granted for its incremental contribution of the photographer's creative choices, see *SHL Imaging*. Photographer's images are creative in nature and thus closer to the core of intended copyright protection than are more fact-based works, see *Perfect 10, Inc.* Federal courts have historically applied a generous standard of originality in evaluating photographic works for copyright protection. No photograph, however simple, can be unaffected by the personal influence of the author, see *Schrock*. In assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability, see *Meshwerks*. Works that replicates another work with total or near-total fidelity are not copyrightable, see *Schrock*. A copy of a work in a different medium that lacks creativity is not copyrightable, see *Bridgeman Art Library*. A work is not copyrightable if it lacks creativity or original expression, see *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*

The majority of people today use either their phone camera or digital cameras using the point and shot concept. With these devices, the camera normally makes many of the choices and decisions in the taking of the picture, such as the selection of aperture, shutter speed, and focus. In using the automated settings for a camera, we are trusting the default manufacture settings for a given environment that the camera perceives through its' sensors and algorithms that determine the optimal solution for the scenario. These calculations are normally based upon an interpretation for the conditions perceived through the sensors and the averaged best solution. The camera does not "see" everything as we see them through our eyes. There may be circumstances that the Photographer can choose a setting that improves the quality or their vision and objective in the photograph. Of course, the Photographer can normally still make choices such as changing of the lens to modify the perspective, stage the scene, timing of the photograph, control the lighting

and such. The nice part of using automated settings is that the Photographer can focus, so to speak, on the most important element, the subject of the photograph.

The art or concept of photography emulates the visualization of the image by the Photographer during all stages of photographing a subject. This includes foreseeing and picturing the image in their mind before capturing the image at the moment of exposure through post processing the image through film development or post processing software. The Photographer can use their imagination and has total freedom of expression in portraying the image as they have foreseen it. The essence of a work of art reflects the artistic creative nature of the Photographer, it is self-evident as the work speaks for itself.

In general, most photographs taken today would fall within the timing criteria, whereas photographs are taken on vacation, sporting events, family reunions, and other places, events, and people we encounter and wish to remember through a photograph. Another major category of photographs pertains to the posing of the subjects, such as family picture during the holidays. The primary creative element in the timing of the photograph is choosing when we capture the subject. The primary creative element in posing the subject is selecting the perspective how to combine multiple subjects in the photograph to meet our vision. The timing or posing aspect are in themselves normally enough to meet the creativity requirements for copyright protection, especially when the subject of the photograph is a person, place, event, or something more than a simple object. When we are photographing simple objects such as a bottle, coin, brake light, or basic Chinese meal, then we need to demonstrate how we used creative judgment in the creation of the image and the resulting differences in the photograph; that the photograph does not just reflect the image of the subject with absolute fidelity.

One of the primary objectives of this section is to explain some of the different choices involved in taking photographs and how they affect the photograph. From the perspective of the Photographer, it is always important to expand your knowledge and skill set, from which you can use new hardware, tools, and techniques to enhance the creativity used in your photographs. The Photographer should also learn how to articulate their objectives and creative judgment used in order to meet their goals. Sometimes we do things instinctively without fully understanding how they effect and can enhance our photography skills. From the legal standpoint, the options show the benefits in the decisions we make and how they affect our photographs. Pictures showing a comparison of the base photograph and a photograph with the creative option selected are presented to demonstrate the effects to the photographs. Other photographic comparisons show differences in the result and why certain choices are made, such as which lens to use in a given circumstance.

The following presents an analysis of the common elements considered for the incremental contributions for determining whether a photograph is copyrightable. A technical analysis is first presented on each subject including a definition, functional overview, how it affects your photograph, and other useful information to enhance your knowledge on the subject. The author then presents his perspective and how he applied creative judgment in photographing coins or photographing in general within the bounds of that subject. A legal analysis is then presented to show the relevant case law and a study of how the law would apply in different scenarios.

This section was not intended to be all inclusive of every tool, option, software, or otherwise that can be used as a creative element in the taking or enhancing of a photograph. The concepts outline herein should be able to be applied to almost any scenario or case envisioned. The objectives and principles are fundamental and basic: what was the objective and vision in capturing the image, what creative judgment was used to accomplish this, how does the image reflect the creative judgment used.

Remember also, when determining whether a work meets the criteria of creativity in order to be covered under copyright laws, there are no absolute rules, there are guidelines that are applied to each work based upon on their own merits. Many courts that have weighed in on copyright laws when applied to photographs have been relatively consistent in their reasoning, therefore these guidelines as presented by the different courts are easily interpretable and can be logically applied to most scenarios.

There are normally three primary stages in the creation of an image, and some of the choices that are made by the Photographer in the creation of the image:

1. Preparatory or setup stage. This usually involves the selection of the equipment and tools to take the photograph, such as selecting a cell phone that contains a camera or choosing a camera, lens, film, lens, filters, lighting, and so on. If needed for capturing the image, elements such as: staging the subject or scene; positioning of the Photographer in the proper perspective; environmental factor considerations; waiting for the right moment; and all of the other choices a Photographer might make in accordance to the vision of the Photographer.
2. Depressing the shutter button at the exact moment the Photographer wishes to capture an image of the subject.
3. Post processing of the image (optional). If needed: development of negatives; scanning of images; and manipulation of the images through software or other tools, to process or enhance the image as needed to help meet the Photographer's objectives.

1. Photographic exposure

There are three primary components that normally combine to create the exposure of light to the film or digital sensor: ISO speed, shutter speed, and aperture. The choice in selecting, adjusting, and controlling these components can greatly change and possibly enhance the resulting photograph.

ISO speed. With cameras that require film, the choice of film greatly affect the resulting quality of your image. The speed of the film is commonly called the International Standards Organization or ISO speed. It pertains to the degree of sensitivity the film has to light. The higher the ISO number, the more sensitive the film is to light. The lower the ISO, the less sensitivity and more light that is required for a correct exposure. The sensitivity is a component of the size of photosensitive crystals on the film and the different chemicals used to create the film. Film is primarily a transparent sheet coated on one side with a gelatin emulsion containing microscopic light-sensitive silver halide crystals. The larger the crystals, the less sensitive to

light. Black and white photographic films have one layer of silver halide crystals while color film has three layers; each sensitive to a different color. Some color films have even more layers.

The ISO speed numbers are all relative to one another. If the ISO speed is doubled, then it requires half the sensitivity to light and vice versa. An ISO speed of 100 requires twice the light of ISO speed of 200 and four times the light required for ISO 400. An ISO speed of 400 requires half as much light as ISO 200. For a fast-moving subject or low light environment, you would want a higher ISO speed that has a greater sensitivity for light. For a still or a slow-moving subject in a sunny environment, you can use a lower ISO film speed. The lower the ISO speed the greater light required, but also the greater detail that you can obtain in your photograph. The higher the ISO speed, the grainier the image can be; that is the primary trade-off.

A film with an ISO of 100 or 200 requires ample light and normally should be used on clear, sunny days with still or slow-moving subjects. To increase the light into the camera, an open aperture and slower shutter speed can help generate greater contrast in the image. For fast-moving subjects or low light environments, film with speeds of 400 or greater are more applicable. Faster shutter speeds and a more closed aperture can be helpful in reducing side effects such as motion-blur on fast moving subjects. If higher speed film is used on a bright sunny day, the resulting image may be over-exposed and appear washed out. A closed aperture and high shutter speed can be used to help reduce the light input.

Of course, once a roll of film is loaded into the camera, then the film and its ISO speed are applicable for all photographs taken with that roll of film. To change the ISO speed, the Photographer must change the film with one with a different ISO speed. Choosing a specific ISO film speed for a particular objective in the photograph becomes part of the artistic tools used by the Photographer in creating the desired effects in the image.

With digital cameras there is no film, the ISO speed is set using digital sensors, allowing the Photographer to change the ISO setting between photographs. Increasing the ISO speed in a digital camera should introduce “digital noise.” Most digital camera users will use the default automatic ISO settings, which will adjust to the proper lighting accordingly. If an automatic ISO setting is used, this will be a function of the camera, not a judgment of the Photographer. If a digital camera permits the ISO to be set manually, and the ISO setting reflects the characteristics of ISO film, then adjusting the ISO setting on a digital camera becomes part of the artistic judgment used in creating the image. This reproduction of the ISO speed characteristics by a digital camera would most likely be done through software in the digital camera.

Choosing the correct ISO film speed for a film camera or the setting on a digital camera is the judgment of the Photographer that is used to produce a desired and controlled result in the photograph. Choosing the ISO speed for a digital camera will more likely have no effect on the photograph, dependent on the camera. An experiment was done with a Nikon D90. Photographs were taken of still and moving objects in light and darker environments using automatic mode, ISO 100 manual mode, and ISO 3200 manual mode. There were almost no differences in the images captured in the different modes and ISO speeds.

What is the best way to see and analyze the differences between different ISO, aperture, and shutter settings? For most digital cameras, these functions are set internally by the camera. A User Interface on the camera permits the Photographer to set these features. For older film cameras, these features are set normally through knobs, rings, and other mechanisms on the outside of the camera. Of course, the ISO on film is primarily based upon the sensitivity and the size of photosensitive crystals on the film and the different chemicals used. For digital cameras, the ISO would need to be simulated in an attempt to replicate the light sensitivity.

In order to compare and show the differences for different ISO, aperture, and shutter settings, two Nikon 2020 film cameras were used, one loaded with Fujicolor Superia 1600 35mm negative print film with the second film camera loaded with Fujicolor 100 35mm print film. With the two film cameras loaded with the opposite ends of the spectrum for ISO film and the digital camera containing the ability to set the functionality through the User Interface menu, a wide range of features could be tested on the same subject and compared. For the film cameras, two lenses were used, a Nikon Nikkor 35-70mm AF zoom lens and a Nikon Nikkor 70-210mm AF zoom lens. The digital camera used a Nikon Nikkor 18-300mm AF zoom lens.



The dawn photographs above were taken with a Nikon 2020 film camera using a Nikon Nikkor 70-200mm AF zoom lens using an Aperture of 3.3 and shutter speed set to 1/125. The photograph on the left was with the Fuji Color ISO 100 speed with the photograph on the right taken with the Fuji Color ISO 1600 speed. The 1600 speed film captured more colors in the grass and trees in the low light.



The photographs at the top of the previous page were taken with a Nikon 2020 film camera using a Nikon Nikkor 35-70mm AF zoom lens using an Aperture of 3.3 and shutter speed set to 1/125. The photograph on the left was with the Fuji Color ISO 100 speed with the photograph on the right taken with the Fuji Color ISO 1600 speed. On a bright sunny day, the 100 speed film retained most of the original colors while the color on the 1600 speed film using the large aperture was washed out.



The photographs at the top of the previous page were taken with a Nikon 2020 film camera using a Nikon Nikkor 35-70mm AF zoom lens using an Aperture of 22 and shutter speed set to 1/125. The photograph on the left was with the Fuji Color ISO 100 speed with the photograph on the right taken with the Fuji Color ISO 1600 speed. With the aperture smaller, there was far less light and color lost on the 1600 speed film on a sunny day.

Aperture – The aperture refers to the size of hole in the camera that lets in light. The larger the hole, the greater amount of light that can enter the camera and vice versa. Aperture is measured in ‘f-stops’. Each sequential f-stop from the smallest to largest doubles the size of the hole and the amount of light permitted in. The typical f-stops on a camera might be 2.8, 4, 5.6, 8, 11, 16, and 22; with the smallest being 22 and the largest being 2.8. Changing the aperture from 4 to 5.6 will half the size of the hole and half the amount of light that is permitted to enter the camera.

The aperture is normally contained in the camera lens. In the old C-mount lens, the controls for the F-stop are located at the bottom of the lens and can be set manually. If you remove the lens from the camera, look through the bottom of the lens, change the F-stop and see the change in size of the aperture. On the newer C-mount lens, the aperture is still in the lens, but there are not usually manual controls on the lens as they are controlled through the camera.

The Depth of Field (DOF) is the amount of the image that will be in focus. With a large Depth of Field, most of the subject will be in focus, whether it is close or far away. With a small Depth of Field, part of the image will be in focus, while other parts will be out-of-focus and fuzzy. The larger the aperture (smaller the number), the smaller the depth of field and vice versa. For example, if the subject is a tree with a mountain in the background, using an aperture of F/22 (smaller hole) will focus both the tree in the foreground and mountain the background. Using an

aperture of F/2.8 (large hole) will focus the tree in the foreground and the mountain in the background will be blurry.



The photograph on the left shows a aperture set to F/22 (small aperture), while the photograph on the right shows an aperture set to F/4.5 (large aperture).



As seen in the photograph above, for old style lenses, the aperture is set using a dial at the base of the lens. On newer lenses, the aperture is set through the digital camera.

A focused foreground and blurred background might be sought under circumstances such as a wedding portrait whereas the objective is to focus on the bride and groom with the background blurred creating a mystical portrait of the bride and groom. Learning to control the aperture is an artistic photographic tool that can be used to produce desired results.



The photographs above were taken with a Nikon 2020 film camera using a Nikon Nikkor 35-70mm AF zoom lens using Fuji Color 100 speed film with the shutter speed set to 1/125. The photograph on the left was with the aperture set to F/22 (small aperture, clear background) with the photograph on the right set to F/3.3 (large aperture, blurred background).



The photographs above were taken with a Nikon 2020 film camera using a Nikon Nikkor 35-70mm AF zoom lens using Fuji Color 100 speed film with the shutter speed set to 1/125. The photograph on the left was with the aperture set to F/22 (small aperture, clear background) with the photograph on the right set to F/3.3 (large aperture, blurred background). The large aperture permitted more light through the lens.



The dawn photographs above were taken with a Nikon 2020 film camera using a Nikon Nikkor 70-200mm AF zoom lens using Fuji Color 1600 speed film and shutter speed set to 1/125. The photograph on the left was with the aperture set to F/22 (small aperture, clear background) with the photograph on the right set to F/3.3 (large aperture, blurred background). The large aperture permitted more light through the lens and was able capture more color.

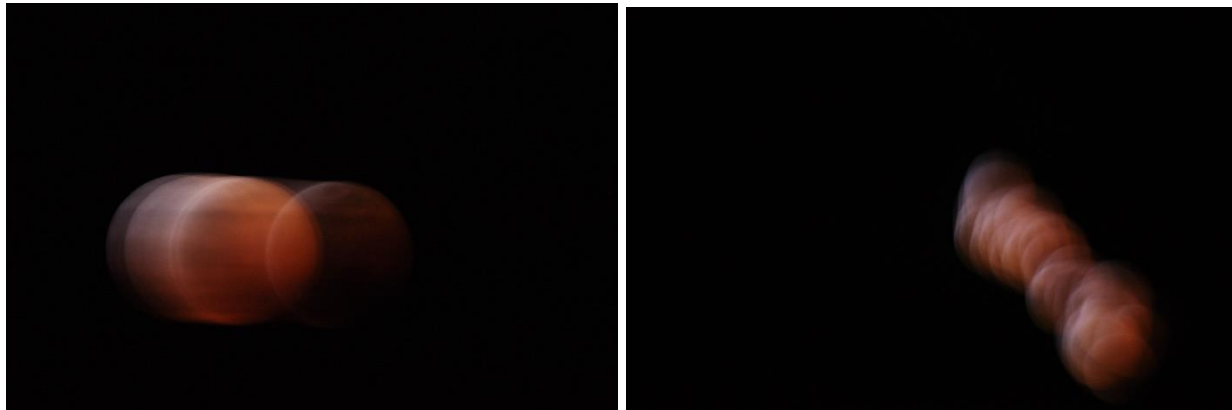
Shutter speed - The shutter speed is the length of time the shutter will stay open in order to capture the image. For most cameras, the shutter speed is selectable and generally doubles between each point, starting at 1, then 2, 4, 8, 15, 30, 60, 125, 250, 500, 1,000, 2,000. There is also normally an automatic mode (A) that permits the camera to select the shutter speed based upon the sensors. In manual mode (M), the shutter stays open as long as the shutter button is held down. Shutter speed is normally a fraction of a second. If the shutter speed is set to 125, then the shutter will open for 1/125 of a second.

As long as the shutter is left open, light and the image are exposed to the camera sensors. If a long shutter speed is used and the subject is moving while the shutter is open, the image will appear blurred along the direction of motion of the subject. Long exposures might be used to capture special images under a controlled environment. For example, during a lightning storm, leaving the shutter open to capture multiple lightning strikes within a single image. Another example is using a slow shutter speed as a special effect for photographing a water fall and creating water in motion. Allowing the shutter to be open for longer periods can also be used to capture additional light, which might be useful for low light environments or creating a brighter image. A fast shutter speed can be used to capture a fast-moving subject such as a flying bird; creating a clear sharp still frozen image of the subject. The shutter speed can also be a tool in using the correct brightness. A faster shutter speed can be used on a sunny day, so the photograph is not overexposed. A slower shutter speed can be used if it is dark so as to capture more light. For slower shutter speed it is better to mount the camera on a tripod so as to reduce movement of the camera from shakiness, which may cause blurriness. Out of the three photographic exposure components, the shutter speed is the one that will most likely be adjusted by a Photographer, especially if the subject being photographed changes from non-motion to moving.

These three photographic exposure components can be combined to create special effects. If using an ISO 100 speed film, this will match closest with the 125 shutter speed and optimize the

photograph, capturing more details and colors from the subject onto the film. If using a shutter speed of 125 with an ISO 400 speed film, then the film will be more sensitive to light, requiring less light, and the resulting image will be more grainy and less detailed than the photo take with ISO 100 film, which may be the objective of the Photographer.

Combined, these three tools offer an incredible choice of combinations in order to obtain a desired brightness on the photograph. The choices the Photographer makes in choosing these components forms their artistic judgment.



The above photographs of the full 'blood' moon were taken with a Nikon D90 using a Sigma 150-600mm lens. The left photograph was taken using a shutter speed of 1 second. The right photograph was taken using a manual shutter speed and held open for about 4-5 seconds. These photographs would most likely be copyrightable based upon the choices of camera, lens, and control of the shutter speed in order to meet the objective of the photographs.

The photographs of a spinning bike tire on an upside-down bike on the next page were shot with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens from about 3 feet away. Tin foil was placed in the spokes to reflect sunlight and provide a thicker target to visualize. The shutter speed was set to manual mode by turning the dial to 'S' and use the knob on back to adjust the shutter speed. The shutter speed could be set from a low of 1 to a high of 4000.



The photograph above on the left was shot with a shutter speed of 50 with only a little of the spokes visible. The center and right photographs were shot with a shutter speed of 125 in the

shade. The center photograph was shot in bright sunlight, while the right photograph was shot in the shade. The bright sunlight over-exposed the image making the spokes almost completely invisible. The spokes in the right photograph are visible, but blurry, especially near the ends. How light affects an image is one of the greatest considerations in taking a photograph.



The photographs above were shot from left to right using a shutter speed of 200, 400, and 800 respectively. Notice as the shutter speed increased, the level of detail of the spokes and tire increased.



The photographs above are closeup of part of a waterfall in West Virginia shot with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens in the manual ‘S’; speed controlled mode. From left to right, the shutter speed was set to 125, 50, and 15; creating three images that entirely different in their effect and appearance.

Author’s choice in photographing coins. The author normally uses Kodak BW400CN film for photographing coins. The author found through experimenting that this film was best for photographing coins using a film camera attached to the top of a zoom microscope. Due to the light lost on using a camera with an extension for the microscope, there was a significant amount of lost light. In addition, the coins were sometimes dark, requiring greater light. The images on a coin are also simple in nature, with the details of the coin captured with 400 ISO speed film. As an extension tube is used to mount the camera onto the microscope, then there is no camera lens and therefore no aperture. Automatic shutter setting were normally used to allow the camera to determine the proper exposure time, especially given that there is no camera lens attached to the camera.

In photographing action shots such as during the author's son's ultimate Frisbee tournaments, the author normally uses a Nikon D90 digital camera with an 18-300 zoom lens. The author uses the AUTO shutter speed with a smaller aperture for fast moving subjects, which permits the camera to choose, and lets the author focus on taking action shots of the event. But for still events, such as a group photograph of the team, the author normally selected a large aperture and slow shutter speed to maximize the light entering the camera and optimize the details and color of the photographs.

Legal analysis – The Supreme Court stated in *Feist* that the work must “possesses at least some minimal degree of creativity. 1 *M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B]* (1990) (hereinafter *Nimmer*). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark.” As stated in *Meshwerks*, the photographer is entitled to sole based upon those ingredients that traditionally apply to the art-form that reflect the photographer's decisions. As stated in *Daniel P. Schrock, d/b/a Dan Schrock Photography vs. Learning Curve International, Inc., RC 2 Brands, Inc., and Hit Entertainment No. 08-1296*, the Court of Appeals for the Seventh Circuit stated regarding the standards of originality in evaluating photographic works for copyright protection include selection of the film and also almost any other variant involved. As stated in *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000), the Court stated “What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its “incremental contribution” and “There is no uniform test to determine the copyrightability of photographs.”

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding choices made in choosing the film as an incremental contribution to the creativity:

Second, some of the photographers decided to use certain brands or types of film because of the film's particular qualities. (Shih Dep. at 75; R. at 250 (Aug. 23, 2004).)

If the Photographer uses no specific judgment is controlling the ISO speed, aperture, and shutter speed, then the Photographer is allowing the camera to select and optimize these settings, therefore there is no choices or artistic judgment in the selection of the exposure and this is not part of the incremental contribution to creativity.

If the Photographer makes choices in any of the three primary photographic exposure elements in taking photographs, then these choices become part of the incremental contribution to the artistic judgment and creativity used by the Photographer to meet their objectives and vision.

If the Photographer adjusts or considers these components when taking each photograph, then the level of impact to the choice and judgment is greater. If the components are selected for a group of photos, such as using a higher ISO speed for a roll of film for photographing a low light environment or setting the shutter speed to 100 for all photographs taken for a sunny environment, then the level of choice is less as compared to if it was considered or chosen for each photograph. If these components are the only incremental contribution, it would depend on how the differences affect the objective of the Photographer and as seen in the photograph as to

whether it would amount to enough creativity to be copyrightable. Take for example where the Photographer sets his digital camera to use a shutter speed of 125. Then sets his camera up to photograph a series of coins with the objective of capturing the full image of each coin with total or near-total fidelity. The lens is not refocused for each image. No judgment or changes are made between photographing each coin. Then this single contribution would more than likely not be copyrightable. In the alternative, if the Photographer considers individual treatment for each photograph, such as focusing, posing the subject, and lighting, then the level would more than likely meet the requisite level required for copyrightability. In another example, with the objective of photographing all houses in a town, a camera is setup on top of a car and is set to automatically photograph each house as the car drives through town. In this scenario, there is no individual artistic judgment or creativity in the taking of each photograph and these photographs would probably not be copyrightable. The most important control is, of course, the photographer's vision. How they chooses the vantage point and the exact moment of exposure. The photographer perceives the essential qualities of the equipment used and subject and interprets it according to his or her judgment, taste, and involvement.

As with most of the creative choices and judgments, the Photographer should be able to articulate and demonstrate. They should be able to describe the choices they made and objective and also show what the differences produced in the photograph. As stated in *Meshwerks*, "*in assessing the originality of a work for which copyright protection is sought, we look only at the final product.*" The final product is the photograph, which should reflect the creativity used. For example, if photographing a sports event, the Photographer might choose to use a fast aperture speed in order to capture fast moving subjects in a detailed still photograph. The resulting photograph will show a still image of a fast moving object with extreme details. In another example, with the objective of photographing a full moon at night with a film camera, ISO 400 speed film is chosen for low light. The aperture is set to its largest opening to focus on the central object and create a haze in the background, and a slower shutter speed is used with the camera mounted on a tripod so as to capture more-light and greater detail over time. The resulting photograph will show a centered detailed moon surrounded by a slight blur that appears like a haze.

2. Black and White vs Color

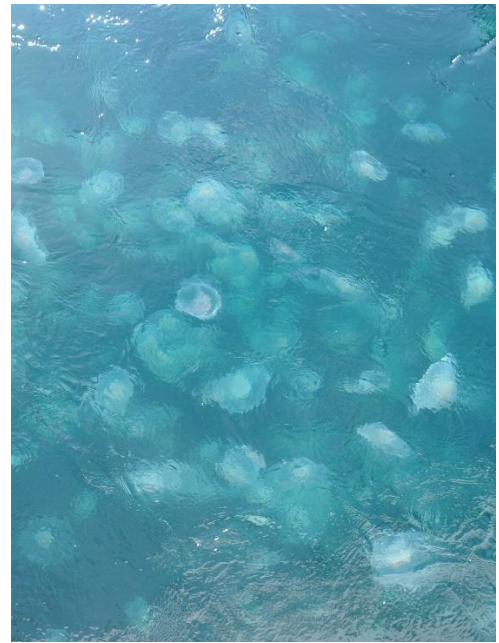
Photography dates its origin to the mid-1830s. Early photographs did not use film, but silver-plated copper sheets. The first film in roll form was made by George Eastman in 1885, which used paper. The first film on transparent plastic was created in 1889; this used nitrocellulose, which was flammable. Kodak introduced film named Safety film in 1908, this used cellulose acetate that was not flammable.

Color was experimented in photography from its inception. Early photographic plates were primarily sensitive to the blue and violet end of the spectrum. In 1873, Herman Vogel discovered how to use dyes added to the emulsion to increase sensitivity to green and yellow lights. In 1907, the Lumiere Autochrome, a glass plate, was the first commercially available color film. In 1935, Kodak introduced Kodachrome, which used a multi-layered emulsion. This was first used for home prints, then for still cameras. Color film required more light, produced images that were usually darker, and was much more expensive than black and white film. It was not until the mid-1970s that color film improved in the quality of the images and became more affordable that it replaced black and white film as the standard. The challenge today for Photographers who use film cameras is that there are fewer places to get film developed, especially with B&W film.

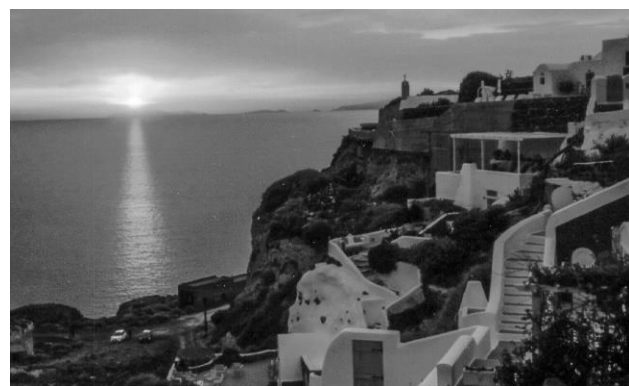
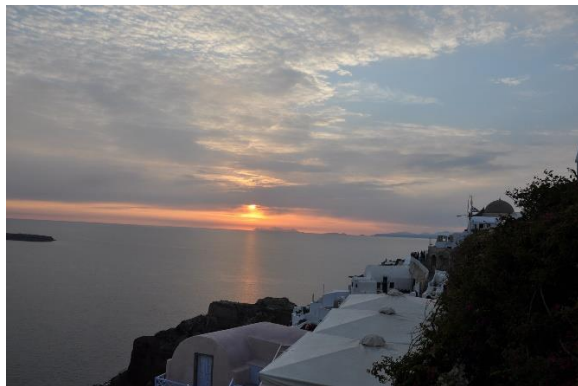
With film cameras, besides the choice of the ISO speed, the Photographer can also choose black and white (B&W) or color film. Of course, most digital cameras provide the option to photograph in monochrome. Color prints can also be scanned and converted to black and white digital images. Digital images can be converted to B&W through software applications such as Photoshop. Color and B&W both have their advantages in photography, understanding the benefits and results offer a wide range of choices and tools to enhance a Photographer's creativity in their photographs. Of course, digital cameras offer many options in how the images are saved such as NEF (RAW) + JPEG fine, NEF (RAW), JPEG fine, and so on, which provides the Photographer choices in the quality of the images, such as those with greater detail.

Color images normally present the natural colors of the subject. In many cases, the color tells part of the story seen in the photograph, such as the tone of red in a glass of red wine can provide essential information regarding the wine. The hues or shades can also provide combinations of colors that add artistic elements to the photographs. For example, how blue the ocean is or the beauty of the colors of autumn leaves.

Black and White images can represent the fundamentals of a subject and more likely to bring the viewer's attention to the details of the image rather the colors that combine to make the image. In deviating from the natural colors and reality of a subject, B&W photos also can be used to add a sense of mystery, aura, and perhaps reflect a time lost forgotten. Contrast between the details of the images can be improved with B&W film. Color photographs can have a wide range of tonal transitions that can sometimes blur the edges and details of the subject. B&W photographs normally have less dramatic transitions and can produce sharper details through improved contrast; helping to make the image appear a more accurate reflection of the subject. Using B&W photographs can also make the cost of printing a book lower.



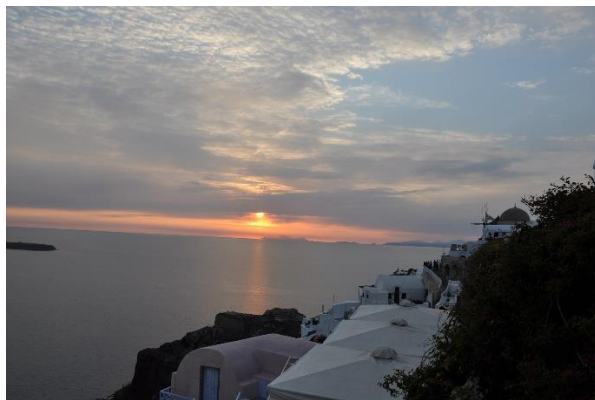
The color is sometimes used to tell part of the story. In the above photograph on the left, the author's wife was standing at the end of a tunnel; the color is irrelevant to the story in the image, it is more about the appearance of the person in a Michael Jackson pose with an extremely lit background creating a halo effect and mystic aura. The center photograph is of a beer taken while in Munich Germany. A beer is defined and categorized by its color, from pale lager to a dark imperial stout. The color is primarily created through the ingredients, recipe, and process in creating. An important attribute in a beer is its color. The photograph on the right shows a large school of jellyfish together (also called a smack) seen in Alaska. If the image was in B&W, it would still tell the same story, many jellyfish together.



The above photographs of Santorini Island in Greece were taken with a Nikon D90 using a Nikkor 18-200 autofocus zoom lens. The sunsets at Santorini Island are claimed to be the best in the world. The author chose a position in order to capture the photograph that included in the foreground the sloping hillside and white houses and a background of the setting sun with an island on the right side. The photograph on the left is in color with the sun slightly above the horizon. The author changed his perspective slightly and the D90 was switched to Black &

White mode for the photograph on the right with the sun right above the horizon. The essence of the two photographs is an entirely different feel.

Which would produce better B&W photograph, using B&W film or changing the mode on the digital camera to monochrome? There is no easy answer, there are multiple factors to consider such as: The type and quality of the B&W film. The size and sensitivity of the silver halide crystals. The tools, process, solutions, and paper used to convert the negative to a printed image. Film of the same ISO speed from different manufacturers can produce different results; The software and sensors used in digital cameras. The software is the algorithms in cameras that determines how an environment or condition is produced or simulated. The digital sensors are the physical devices that capture and store the light containing the image of the subject. The quality and sensitivity of the physical components and the intelligence driving the software algorithms are normally different with each camera and different manufactures; The subject of the photograph. A subject might be conducive for a B&W image. It might contain sharp distinct edges; be simplistic in its essence; not containing colors which define its meaning, such as red wine; contain tonal transitions which easily convert to shades of grey; Based upon these and other factors, it is almost impossible to categorically state that B&W film is better than digital monochrome or vice versa. Sometimes the best way to figure something out is choose a subject and determine yourself which is better for the given environment, circumstances, and subject of the photograph.



Is there a difference between a photograph taken in B&W compared to a photograph converted from color to B&W? The photograph above on the left shows the color image of the sunset at Santorini Island in Greece. The photograph above on the right shows the same image with the color stripped out through software. The light from the sun and blue in the sky have become shades of grey. The houses have toned down from their pure white color. In general, it looks like the B&W photograph taken previously, but there are slight differences. The houses and structures for example in B&W photograph shown on the previous page are whiter than the dull white in the converted B&W image. Of course, this could reflect the software tool used to convert the image and better software may improve the quality of the image. Through 25 years of experimenting with taking photographs of coins using B&W film versus converting images from color film to B&W, the author has found better quality images from taking the pictures directly from B&W film. This conclusion should be applicable in most cases in which B&W images are desired, but there will be exceptions based primarily on the subject of the photograph.



The scanned images above are from the same color photograph as seen on the left. When scanning, the image on the right was converted to a B&W image; notice how the shrubs, trees, and grass are a shade of grey, but the primary focus of the White House is only slightly changed from a white to a dull white.

Author's perspective – The majority of the thousands of photographs the author has taken for his books on numismatics involve small details on the coin that were primarily created when the working dies used to strike the coins were created. This includes overdates, repunched dates, over mint marks, repunched mint marks, doubled dies, and such. B&W film was used for several reasons. The color of the coins is irrelevant. The primary focus of the photographs is to show the details of the die variety. With B&W film greater contrast was obtained, creating sharper details of the image, which as the objective was to present the die varieties, this optimized the presentation of the details in the author's books. With color photos, there is more of transitional color area that can be a problem, especially when scanning, sizing, printing, moving from different software, and so on. The cost in printing a book with B&W photographs was at the time, much cheaper. When the author started taking photographs through a microscope, the author experimented with both B&W and color films, different ISO film speed, and sometimes with different film manufactures to determine the best images that could be produced.

Legal perspective – Color and B&W photographs each have many advantages in enhancing a photograph. This provides the Photographer choices in which they can improve the creativity in photographing the image that meets their objectives.

If the Photographer chooses B&W or color film for their camera without purpose or objective, or selects the default color settings, then there is no vision or creativity on this component of the photograph and therefore it does not add to the copyrightability.

If the Photographer chooses to take the photograph in B&W or color with a specific objective, such as creating greater contrast through B&W, then this would add to the incremental contributions towards an image being copyrightable. Some contributions, such as using B&W can have a much more visual effect on the photograph making it easy to see and identify the differences intended by the Photographer. As such, contributions such as this can carry greater weight than other contributions which display less visual differences.

If a Photographer chooses a B&W roll of film, then all photographs taken with that roll will be B&W. The key here why did the Photographer choose the B&W or color roll of film? If this was part of their vision and objective, then it is an incremental contribution to the copyrightability. Selecting a brand of film because of its price does not add to the artistic improvement to a photograph. Choosing a brand of film that the Photographer believes will produce higher quality images or create the effect they desire in the images is a choice that is an incremental contribution. For digital cameras, the Photographer can change between color and monochrome through the User Interface.

If a photograph is taken in color on a film or digital camera, then converted to B&W through a software application, and it is part of the objective and vision of the Photographer, then this can also be considered part of the creativity and incremental contribution to the photograph. Take for example in *ANDREW PAUL LEONARD, d/b/a APL Microscopic vs. STEMTECH INTERNATIONAL INC*; Nos. 15-3198& 15-3247; August 24, 2016, which stated: “*Leonard obtains cell samples from doctors, scientists, and researchers and pays a scientific research institution to use an electron microscope to photograph the cells. The images first appear in black and white, and Leonard uses his “artistic judgment” to enhance the photos in color.*” Under U.S.C. § 201(B), Leonard was the author of the work as it was a work for hire. Leonard did not create the work, so he could not claim his artistic judgment being used to create the image. The artistic judgment by Leonard was post processing of the photographs to convert them from B&W to color. This also shows that this one contribution was enough to meet the artistic contribution level to be copyrightable.

If a reproduction of a work is made and enhancements are made to the work, does that make the work copyrightable? For the derivative work to be copyrightable, the changes must include “*great skill and originality*” or “*substantial variation*” from the original work, see *ATC Distrib. Grp.* For example, if a copy is made of a Black & White photograph in which the copyright protection of the photograph has expired and color is added to parts of the image through software tools, the changes must mean the criteria of being “*great skill and originality*” or “*substantial variation.*” Would adding color to the derivative work add enough contribution to be copyright? Perhaps this would depend on how the perception of the image changed, with greater variation in how the work looks, equaling the creativity used in making the difference. It is not known if the author of a work is making the creative enhancements, such as seen in Leonard, carries more weight than if it is a third-party is making the changes. It is more likely that being the author of a work would help, especially given that the creation of the work in general was their idea.

3. Camera

Probably the most important tool in the creation of a photograph is the camera. This device can also have the greatest variance on the options and creativity the Photographer can choose. Part of the challenge in photography is learning and understanding the equipment and technology to further the creative choices and decisions in taking pictures.

Some cameras are simple point and shoot, which offer little to no control over options such as shutter speed. Almost everything in these cameras is automated, providing the Photographer a simple means to just choose their subject and photograph. Of course, this removes the possibility of many of the incremental contributions from these control features. This does not mean that a photograph taken with a point and shoot camera cannot meet the level of copyrightability, especially given that normally, the most important contribution to the creativity is the Photographer's perspective, vision, and the rendition of the subject matter. As stated in *Meshwerks*, "*photographs are copyrightable, if only to the extent of their original depiction of the subject.*" In today's age of electronics, probably one of most used tools to take photographs is the cell phone, most of which have cameras. Some options, such as shutter speed might not be available on some camera phones, while other options, such as zooming will be. Learning how your camera works will help improve your photography skills and provides more choices and options in taking pictures.

The camera is usually the central tool from which the Photographer perceives their subject. Some cameras have fixed lenses while others provide removable lens that can be replaced, providing the Photographer different choices of lenses, which can greatly improve the zoom, exposure control, clarity, and lighting in shooting the subject. Most cameras contain a lighting source such as a flash, others contain a boot from which lighting sources can be attached to the camera with the lighting source synchronized in the taking of the photograph. Some cameras offer connections to computers or other viewing platforms, offering the Photographer a large screen to view the subject. There is the obvious choice for film and digital cameras and the advantages of each. Does the camera just offer single photographs or does it permit continuous photographs when the picture is taken? All these tools offer the Photographer creative choices that they can improve their photographs with; without sacrificing the ability to make their own decisions.

More advanced cameras normally provide the Photographer a greater number of options to the controls that can affect the photograph. They also can offer great variation in the controls, such as a higher shutter speed or greater number of output storage types such as jpeg or tiff and the variances of density of the images. The objective is to offer the more advanced Photographer, who normally has the experience, skill, and understanding of how the controls can affect the photograph and permits them to make those choices to improve the photograph based upon the Photographer's objective and vision for the photograph.

Some cameras are designed to work in specific environments such as underwater, small spaces, or perhaps rugged outdoor terrain where there is higher probability of being dropped. Choosing a camera specifically because of the design, features, controls, and options available in order to

accomplish the creative objective of the Photographer add to the incremental contributions to the artistic judgment and copyrightability of the photograph.



The above photograph shows many different types of cameras such as film cameras, digital cameras, cameras with interchangeable lenses, cameras with fixed lenses, underwater cameras, and a camera designed for action photography. Each provides their own benefits and uses. The selection of a particular camera to fulfill the vision of the photographer adds to the incremental contribution of the creative judgment used by the Photographer. The above photograph would most likely be copyrightable given choice of camera, lens, and focus of the subject, and the posing of the cameras together in accordance to the author's vision. The author also took approximately 8 different poses of the cameras combined in different ways, from which he chose this one. A bed sheet was used to remove any background distractions.



The above photographs were taken with a film camera that had a manual lever to advance the film. Multiple images were obtained by not advancing the film on sequential photographs creating a duplicate illusion.

Author's perspective – For micro coin photography, the author uses a Nikon 2020 film camera. When photographing coins through a microscope, the lens of the microscope becomes the lens of the camera. An adaptor is used to mount the camera on top of the microscope. When using a camera with an adaptor on a microscope, there is a substantial loss of light, which also a reason to select high speed film, which requires less light.

The majority of author's Photographs cover a width on the subject matter coin from 1/100 of an inch to 1/10 of an inch. Most cameras, especially during the 1990s when the author began photographing coins cannot fully capture this small an area, especially when using a camera lens. The author chose a microscope with a zoom lens so that he can quickly focus on the area. Each photograph normally required refocusing the zoom lens after adjusting the angle of the coin and lighting. The choice of a manual camera also permits the author greater control over how the photograph is taken, which helps making the photograph more toward the author's objectives. Many digital cameras the author has experimented with were found to be extremely difficult in the manual mode using the adaptor instead of the normal lens. Many digital cameras have sensors that are dependent on the lens that are used with them. Without the lens, it required much greater control and experimenting to photograph through a microscope.

The author has also found that in choosing film cameras, when used with a microscope produced much higher details, more controlled images, allowing much more manual control by the operator, and also required less light, producing higher quality detailed images that are not drowned out by over-brightness.

The author also has several other cameras such as a Nikon D90 digital camera with several lenses and a Canon Power Shot. The Canon Power Shot for example is a nice small digital camera with a zoom lens that is great for general photography that is easy to carry around because it is relatively small and light. The author has also experimented with many other film and digital camera to determine if there is a better camera to produce micro photographs of coins. For example, the author recently purchased a Nikon F-4 film camera, which was one of the top film cameras during the 1980s. Experimentation and trial and error is one of the best ways to learn.

Legal perspective - Using an expensive camera or other equipment, or the skill or process required to accomplish the task does not imply creativity. The critical element is the choices, vision, and judgment used by the Photographer in creating the images. As stated in *Feist*, originality, not “sweat of the brow,” is the touchstone of copyright protection. The Court in *Meshwerks* stated that the amount of time, effort and skill does not guarantee copyrightability, they stated:

In reaching this conclusion, we do not for a moment seek to downplay the considerable amount of time, effort, and skill that went into making Meshwerks' digital wire-frame models. But, in assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.

An interesting evaluation is required on the use of ‘skill’ as possibly not an element in creativity as stated in *Meshwerks*. A Photographer's originality through choices, vision, and judgment normally comes through the experiences of the Photographer. Experiences are an essential

element in learning through trial and error, knowing what results are produced in a photograph through the selection of the multitude of combinations and choices possible. Skill is defined as “*the ability, coming from one's knowledge, practice, aptitude, etc., to do something well.*” Skill and experiences are intertwined in the choices we make, especially relating to photography. Of course, the best way to clearly demonstrate that creativity was used is to be able to articulate what choices were made and why and demonstrate through the photograph the results based upon those decisions. Skill used in the context of creative choices by the Photographer is copyrightable. *Meshwerks* was evaluating skill used in the context of creating a process that created an image that contained no originality.

The majority of individuals will probably use the same camera to take all of their photographs. If there is not a choice in the selection of the camera to meet the objective and vision of the Photographer, then the choice of the camera would normally not be an incremental contribution in the creativity element of a photograph. This of course does not mean that the photograph is not copyrightable, only that the choice of camera was not a contributing factor.

As stated in *SHL Imaging, Inc. v. Artisan House, Inc.*, the camera is a central component in the taking of a photograph, from which other components can be added or chosen, which will affect the resulting photograph.

The technical aspects of photography imbue the medium with almost limitless creative potential. For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding choices made in choosing a camera as an incremental contribution to the creativity:

Court holds that Plaintiffs' photographs are sufficiently original to be copyrightable because they exhibit the requisite level of creativity. Plaintiffs' photographers made several creative decisions that are evident in these photographs. First, the photographers chose cameras which were better suited to their expressive goals, sometimes changing cameras to produce the desired result. (Shih Dep. at 72; R. at 162, 248-50 (Aug. 23, 2004).)

Again, one of the fundamental objectives in demonstrating creativity and artistic judgment is to be able to articulate and demonstrate. Articulate what choices were made and why they were made and demonstrate through the resulting photograph the differences achieved. For example, choosing a camera that permits controls for the aperture and shutter speed, and selection of a quick focus zoom lens in order to create still clear high quality still photographs at a sporting event. The resulting photograph of a fast-moving subject will show a highly detailed frozen image of the subject. Choosing a basic camera with all the controls automated permits the Photographer the fundamentality to focus on the basic task of visualizing and choosing how or when to photograph a subject. For example, capturing the joy and celebration after winning a game.

4. Lens / Filters / Accessories

The lens is the eyes of the camera from which the subject is seen and perceived. The quality of the lens can greatly impact the focus and details of the photograph. Have you ever used a cheaper lens that has trouble focusing, with the resulting images being blurry? Perhaps you have used a lens that normally results in darker images. These lenses are usually cheaper for a reason, such as they are using lower quality glass or glass that is cut and shaped poorly, or does not optimize the light captured with the subject. Have you ever attempted to use an older auto-focus lens on a new camera, sometimes they take longer to focus on the subject and sometimes they do not focus at all. The choices of the lens can greatly impact the resulting photograph.

The objective of a camera is to expose the photosensitive surface (film or digital sensor) to light. Light reflected from the subject being photographed is passed through and directed by the lens. A lens contains curved optical material that permits light to pass through it. As light passes through the lens it is slowed down as it passes through the optical components. The optical material in the lens is curved in a manner in order to diverge and converge the light to focus it on the photosensitive surface and to control the size of the image.

There are many different types of lenses. For example, a Photographer may choose a zoom lens, such as an Nikon Nikkor 18-300mm zoom lens for a sporting event that has fast moving subjects that can be near or far. Still portrait type photographs might benefit from a simple 50mm lens. For close-up photography, a macro lens may be appropriate. There are also lenses that can be used to create special effects, such as a fisheye lens that can make the outer elements of the subject appear closer in the photograph.



The photograph at the bottom of the previous page shows different C-mount lenses. One is a fixed focus distance lens. Several are zoom lenses that can be used for different distances with the same lens. One is a macro lenses that is for micro-photography and another is a fish-eye that has a curved front lens that is used for special effects. Each has benefits which can be used by a Photographer to meet their objective. If the Photographer is photographing distant object that are still, they can use the Sigma 150-600 autofocus zoom lens. For sporting events with action shots, the lighter Nikon Nikkor 18-300 autofocus zoom would be a better choice. If photographing small objects such as a coin, the 60mm macro lens would work best. The above photograph would most likely be copyrightable given the posing of the lenses together in accordance to the author's vision. The author also took approximately 15 different poses of the lenses combined in different ways, from which he chose this one. A bed sheet was used to remove any background distractions.



In the photograph on the right, you can see that the front lens of the Nikon Fisheye 10.5mm lens is at the top of the lens, concave, and is almost the same width of the top. When comparing the fisheye to a 35-70mm lens, the 35-70mm lens is recessed from the front, half the width of the front, and is only slightly concave. The shape and size of the lens plays an important part in how the lens sees a subject.



The distance from the author to the houses in the above photographs was over a mile. The photo on the left was taken with a Nikon D90 camera with a Sigma 150-600mm autofocus zoom lens. The photograph on the right was taken with a D90 camera using a Nikon Nikkor 18-300

autofocus zoom lens. Both lenses were zoomed to their maximum. Choosing the Sigma 150-600mm lens was a better choice to photograph a distance subject that was not moving. Experimenting with different lenses and equipment is one of the best ways to learn which lens is best suited for a given scenario.



The above photographs were taken during one of the author's son ultimate frisbee tournament. A Nikon D90 was used with a Nikon Nikkor 18-300mm autofocus zoom lens. This combination of camera and lens was chosen as it was light and quickly focused anywhere in the field of play, either close-up or 60 yards away. The author would follow the action through the viewfinder, manually adjusting the zoom and focus distance appropriately, keeping the subjects in the field of view. When the timing was right for a photograph, the author would depress the shutter button, resulting in the lens autofocus focusing the subject for a clear detailed photo. As the camera was digital, the author could take several hundred pictures during the tournaments. These photographs would most likely be copyrightable based upon the selection camera, lens, focus, relative position to the sun for lighting, and in the timing of the photographs.



The above photographs were taken with a Nikon D90 camera and Nikon Nikkor 10.5mm Fisheye lens. The front lens of the Fisheye is concave in shape, making the center of the subject appear clear and closer and the outer elements of the photograph appear curved and further away. These photographs would most likely be copyrightable based upon the choice of camera, lens,

focus, and special effects created through the choice of lens in order to meet the Photographer's vision and goals.



The above photographs of the Capital Building and Supreme Court building were taken with a Nikon D90 camera. The photographs on the left were taken with a Nikon Nikkor 10.5mm Fisheye lens. The normal photographs on the right were taken with a Nikon Nikkor 18-300 autofocus zoom lens. The center elements of the images created with the fisheye lens appear closer and the outer elements appear curved and smaller. It makes it much easier to understand how a choice makes a difference when you can see an image with and without the choice included.

Some lenses have different aperture ranges that can affect lighting. A generic lens may react slower in the focus and be less optimized in the selection and control of the lighting than a lens specifically made for a camera, such as a Nikon Nikkor lens for a Nikon camera. Of course, if a camera has a fixed lens, then it normally cannot be changed. There are cell phone cameras that you can place a lens over top of the camera lens to provide an improved zoom and focus capability.

A lens filter or optical filter is normally an accessory that is placed in front of the lens. Most filters are round and screw on to the front of the lens. Some filters are square or rectangular and slide into a filter holder that is attached to the front of the lens. Filters are primarily used to modify the lighting that enters the lens. Many of the effects created by filters can also be created using software to manipulate the photographs.

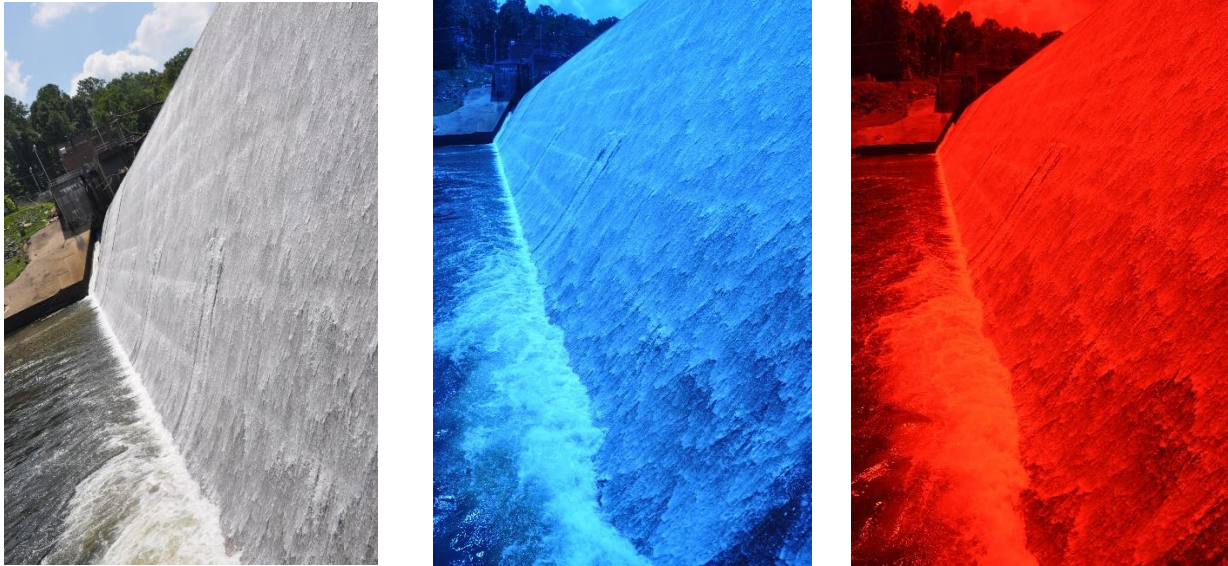


The above photograph was taken with a Nikon D90 using a Nikkor 18-300 lens. An AmScope Series Haloid Lamp 150w that has an adjustable illumination control was used for lighting. The bottom row of filters shows solid colored filters. The top two rows of filters show filters which are half clear and half a mix of colors. The bottom filter is a star filter, which will make light appear like a star shape. The above photograph would most likely be copyrightable based upon the choices of camera, lens, focus of the subject, lighting, and the posing and positioning of the subjects.

There are many different types of filters, such as: General filters that includes UV, clear, and haze filters are used to protect of the front of the lens from dust, dirt, moisture and possible scratches; most of which should only have a minor effect on the image; A polarizing filter are primarily used for outdoor photography and acts in the same way to sunglasses to reduce polarized light. They reduce glare and reflection, which helps increase depth, colors, and contrast in the image; Neutral density (ND) filters that have dark tinted glass that reduce light exposure to the lens, force a slower shutter speed, which can help increase exposure time and create sharper images. The ND filter can also be useful in situations such as when the objective is to create motion blur in fast moving objects such as waterfalls or a moving car; Color or warming/cooling filters are colored glass filters that are used to remove, correct, or enhance specific colors of your subject. For example, a filter that has a green tint on the filter lens will alter the light passing through to a degree of green resulting in the image becoming greenish. Warming and cooling filters can help make your subject appear gloomier or brighter; Close-up filters help shoot macro photography without a macro lens; Special effect filters help enhance the images in different ways, for example a star filter makes bright objects, such as street lights appear diluted and blurred giving the appearance of a star shape. A softening or diffusion filter provide a “dream like appearance that is normally used for portraits. A multi-vision filter will create multiple copies of the subject in the photograph.

The Photographer’s choices of filters are normally used to generate a specific effect and alternation of the subject on the photograph. Using most types of filters provide a dramatic incremental contribution to the artistic judgment by the Photographer to the photograph. The reason for the contribution being dramatic is that the use of most filters can create a significant

difference between the original subject and the image of the subject in the photograph. This makes it easier to articulate the objective of using this choice and showing the resulting differences created. Some filters, such as those used to protect the front of the lens have little to no effect on the image and therefore offer little to the contribution. If the Photographer uses the same filter for every photograph, then the incremental contribution may be diluted a little and not a dramatic contribution, unless the Photographer considered for each photo if a filter would benefit. The difference being choices made for each photograph or just a default setup for all photographs.



The above photographs were taken with a Nikon D90 using a Nikon Nikkor 18-300 zoom lens. The left photograph used no filter. The center photograph used a blue filter. The right photograph used a red filter. The filter tints the incoming light the color of the filter.



The above photographs were taken with a Nikon D90 using a Nikon Nikkor 18-300 zoom lens. The left photograph used no filter. The right photograph used a green filter, which make the trees and water appear greener.



The above photographs were taken with a Nikon D90 using a Nikon Nikkor 18-300 zoom lens. The left photograph used no filter. The right photograph used a yellow filter, which make the flowers appear more yellowish. The above photographs with filters would most likely be copyrightable based upon the selection of camera, lens, focus of the subject, and choice of filters in order to meet the objective of the Photographer.

There are attachments that can be added to the lens that are normally used to change the focusing distance of the lens. An extension tube can be used to increase the focusing distance and is placed between the camera and lens. The extension tube contains no glass and is simply used to create greater distance between the lens and the focal plane of the camera. This permits smaller images to appear larger in the frame.

For example, there are 2x extensions attach between the camera and lens that can be used to double the focus length of the lens; changing for example a 50mm lens to a 100mm focus length. Of course there may be side effects, such as the loss of light resulting in a darker image that may require adjusting the ISO setting on digital cameras and aperture settings. A bellows is an attachment between the camera and lens that can be used for close up photographs. The bellows is a collapsible/expandable light-proof tube than can be used as an adjustable extension tube. With the bellows, the Photographer can move the lens further or closer depending on whether they wish the subject to appear. A reversal ring is used to attach the lens backwards, converting a normal lens to a close-up lens.

The objective of using attachments is normally to change the focusing distance and perception of the subject as seen through the lens. These choices by the Photographer add to the incremental contribution to the creativity and artistic judgment in the creation of the photograph. The level of contribution is increased through the Photographer's consideration and possible alteration of the attachments for each photograph. If the attachment becomes a constant unaltered fixture of the camera, then the level of contribution is less.

Author's perspective - For most of the micro coin photographs, the author uses a microscope lens, which is substituted for the camera lens. The author uses a microscope with a 15-60x zoom lens that a camera with an adapter can fit over the viewing lens of the microscope. This permits the author to take extreme close-up photographs of parts of the coins. The 15-60x zoom permits a wide variation in the choice of the size of the area being photographed. The microscope also

has an focusing knob which permits the lens to be raised or lowered permitting quick focusing of the subject.

For full-photo coin photography, the author uses a Nikon Nikkor 60mm macro lens with either a Nikon 2020 film camera or D90 digital camera. The 60mm macro lens is an auto focus lens that can take very close up detailed photographs from a short distance.

For sports photography, the author normally uses a Nikon Nikkor 18-300 auto focus zoom lens that takes great detailed photographs from close up to 100 yards away. The author has other auto focus zoom lenses that he uses based primarily upon the distance of the subject. The author has lenses such as a Nikon 50mm lens that is closed for relatively close subjects that are still.

The author has special effect lenses such as a Nikon Nikkor 10.5mm fisheye lens that is used to bend the perception of the subject with elements on the outside of the image appearing further away.

The author has experimented with different attachments such as 2x extensions and bellows for coin photography.

Legal perspective – The lens is the eye of the camera and is one of the core elements in taking a photograph. The choice of lenses, filters, and accessories can greatly affect the perception of the subject and the resulting photograph. The Photographer's vision and objective in how the subject is presented in the photograph is the Photographer's creativity and artistic judgment in creating the image. The choices of lenses and other tools is how the Photographer accomplishes those objectives and creates his photograph. The photograph is not only affected by what components are chosen, they also reflect how these tools are used. Those elements in the photograph that are attributed to the Photographer's artistic judgment is what is copyrighted.

As stated in *SHL Imaging, Inc. v. Artisan House, Inc.*, the lens can be used to affect the perspective of the image; filters can alter color, brightness, focus, and reflection of a photograph; other components such as extension tubes can be used to change the field of view and magnification of the subject. In choosing these tools and how they are used, the Photographer controls and enhances their perception and objective in the resulting image. The choices of components and how they are used add to the incremental contribution of the copyrightability of the image. The Court stated:

The technical aspects of photography imbue the medium with almost limitless creative potential. For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding choices made in choosing the lens as an incremental contribution to the creativity:

Third, some photographers chose specific lenses to achieve a desired outcome. (R. at 119-21, 248 (Aug. 23, 2004).)

If a fixed lens is used, then there is normally no choice based upon the objective of the photograph and the contribution of the fixed lens to the incremental contribution is minimized.

Point and shoot cameras normally have a single fixed lens and no attachments that can be added. The majority of cell phones have a single fixed lens; with some in which you can add a secondary lens. Of course, a photographer can choose a camera with a particular fixed lenses to meet their objective, and the combined choice of camera and lens is part of the incremental contribution.

If a Photographer uses the same changeable lens for all circumstances, for example if the Photographer only has one lens, then there only is a minimal incremental contribution for choice of lens. In other scenarios, for example, if the Photographer specifically chose his lens for a special circumstance, such as macro photography, then the incremental contribution is greater. In most situations, a Photographer might choose the same lens for all photographs of the same category, for example close up photos of coins; sporting event; portraits; outdoor scenery; underwater; and so on. These are not choices for each photograph, but for each group of photographs within the same category. This does not dilute the choices made towards the incremental contribution. The Photographer's objective and choices in their photographs still contribute towards the vision of the Photographer, and therefore towards the creativity and artistic judgment of the photographs.

Of course, the greater the number of choices that are made in choosing the tools for a photograph, the higher the contribution towards choice and creativity. If the Photographer chooses or considers different lenses and components in each photograph, the greater the contribution. Some lenses are used to create special effects, such as a fisheye lens that has a curved outer lens that bends the light and changes the perspective, especially the outer elements seen in the photograph that appear farther away than the central subject.

Filters and other accessories can be used to dramatically affect the appearance of the image. The greater the impact and difference seen in the photograph, the higher the contribution. Filters that are simply used to protect the lens and have little effect on the image offer no contribution to the creativity. If a filter is used for all photographs, it offers less of a contribution than if considered or changed for all photographs.

5. Focus

The focus is the desired perspective of the Photographer of the subject in the image. The normal objective of focusing is to capture sharp details of the subject in the photograph. If the subject is in-focus, then sharp details are seen of the subject through the lens. If the subject is out-of-focus then the details of the subject are blurry. The focusing distance is the optimal distance between the camera and the subject where the maximal sharpness of the image is obtained. The minimum focus distance is the closest distance between the camera and subject in which the lens can obtain focus.

The focal length is the length in millimeters (mm) of a photographic lens. This length represents a calculation of the optical distance from the photosensitive surface to the distance in the lens where light rays converge to form a sharp image on the photographic surface. The focal length of a lens is determined when the lens is focused at infinity. The focal length determines how much of the scene (field of view) will be seen through the lens and the magnification of the elements in the scene. The angle of view is the angle from the focal plane to points where the light rays converge to form a sharp image. As the focal length is increased, the narrower the angle of view and the higher the magnification. The shorter the focal length, the wider the angle of view and the lower the magnification.

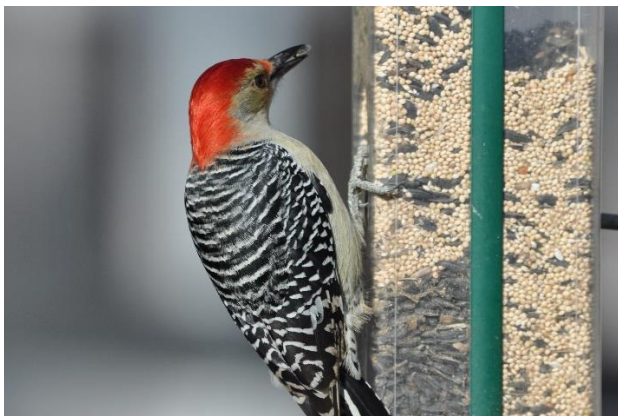
To help understand focal length and the length between where light rays convergence and the focal plane, think of using a magnifying glass to create fire. If the magnifying glass is held to far, the light from the sun through the magnifying glass converges over a vast area. As the magnifying glass is moved toward the source, the light at a given distance will converge to a single point. If the magnifying glass is moved closer, the light will hit over a wide area again. For a camera, when the light carrying the reflection on the image converges on the focal plane then the image is in focus and sharp. When the point of convergence is above or beyond the focal plane then the image will be out-of-focus.

Some lenses have a fixed focal length, these are known as prime lenses, such as the Nikon Nikkor 55mm lens. Zoom lenses are a variable focal length. The clear advantage of a zoom lens is that it can be used in a variety of scenarios from close-ups to distance subjects. The distance between the camera and the subject helps determine what type of lens to use. For close up photographs, a small focal length is desirable, for subjects at a greater distance, the focal length should be longer. The focal length works in the same way our eyes perceive a subject. From a distance, we see a large field of view and the subject is small. As we walk toward a subject, the field of view is smaller and the subject becomes larger.

For zoom lenses such as a 18-300 zoom lens, the front of the lens can be moved forwards and back manually with a zoom ring. By moving the front of the lens forward, the focal length is increased, decreasing the field of view in the frame and increasing the size of the subjects. As the front of the lens is moved closer to the camera, the focal length is smaller, the field of view seen in the lens will increase with the subjects appearing smaller.



The photographs above of the Washington Monument were taken with a Nikon D90 camera using a Nikon Nikkor 18-300 autofocus zoom lens at about one-half mile. The photograph on the left used about 50x zoom while the one on the right used 300x zoom. Entirely different perspective is created in the two images. For those lenses that offer controls and options such as zooming, the incremental contribution includes not only the choice of lens, but also the manual zooming of the lens to create the proper perspective.



The photograph on the left was taken with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens at 15 feet. The photograph on the right was taken with a Nikon D90 using a Sigma 150-600 autofocus zoom at 100 yards. For each photo, the authored first manually zoomed the lens to the appropriate general focus length. When the shutter button was pressed halfway down, the camera in both scenarios was able to automatically focus the subject, resulting in clear detailed images. For example, the photo on the left shows distinct hairs on the head of the bird. In the photo on the right, the feathers on the wings and branches in the nest are easily visible; a fish can be seen in the osprey's talons. These photographs would be copyrightable based upon the selection of the camera, lens, manually zooming the lens, focus, and the timing of the taking of the photographs.



The photograph on the left was taken with a Nikon D90 using a Nikon Nikkor autofocus 60mm macro lens from a distance of approximately 3 inches from the lens to the top of the flower. First the author moved the camera to the appropriate distance from the top of the flower, whereas the subject fills the frame, then the autofocus is engaged. The photograph on the right was taken with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens at approximately 2 feet. Notice the greater detail seen in the flower in the right photograph. A macro lens can focus at a very close distance, but as in the photograph, if the subject is three dimensional, the in-focus elements are fully detailed, while those elements that are further away are slightly out of focus. The zoom lens had captured the details of the entire flower, irrelevant to the different distances of the parts of the flower. With the macro lens, the focal length is much more precise. Understanding how your equipment works under different scenarios and environmental conditions will improve your photography skills and help in your decision process.



The above photographs were taken with a Nikon D90 using a Nikkor 18-300 autofocus zoom lens. The photograph on the left was taken at approximately 20 feet away from the dragon fly. The 18-300 autofocus zoom lens could not lock onto the dragon fly in order to autofocus. The branch below the dragon fly was focused first through depressing the shutter button halfway, then the camera was lifted slightly, focusing the dragon fly, depressing the shutter button fully. In the photograph on the right, the author first focused just the mountain by itself by depressing the shutter halfway down, then quickly moved behind the branches and then fully depressing the shutter; leaving the leaves out of focus and forming a semi-frame around the image of the

mountain. The Photographer's manual moving of the camera to the appropriate distance from the subject or focusing of object at the same distance or focusing first on the subject before adding additional subjects in the photograph in order to meet the objective has a greater incremental contribution than if the same task is done by the camera automatically.

For manual focus cameras or choosing manual on an auto-focus (AF) camera, once the Photographer uses the viewfinder to frames the desired field of view and magnification for zoom lenses, they then uses the viewfinder and focus ring to focus in on the subject until a sharp image is obtained. For Prime lenses the field of view and magnification are already set and the Photographer just has to use the focus ring. Normally the focus ring is turned until the image through the lens until the Photographer sees through the view finder that the images has become sharp, then slowly continue to see if there is a higher quality sharpness. If you rotate the focus ring past the optimal point you will see a lesser quality image showing lower quality and simply rotate slowly back to the point you obtained maximum sharpness. The focus ring adjusts the focal length until a convergence of light occurs on the focal plane to obtain a sharp image.

Auto-focus lenses have evolved substantially over the years. The Photographer normally engages the auto-focus by depressing the shutter button halfway. The camera and AF lens work together to obtain a focused image. There are two types of auto focus systems, active and passive. Active AF involves using the camera to send an ultrasonic or infrared signal towards the subject and using the time it took for the signal to reflect back to the camera to calculate how far the subject is and the optimal focal length. This system is not used on many cameras.

Most auto focus cameras use Passive AF. There are two types of Passive AF, Phase Detection and Contrast Detection. Phase Detection is the system that most AF lenses use. This system permits a very small amount of light to pass through the mirrors of the camera, reflecting to the autofocus sensors. The AF sensor has multiple image sensors with microlenses above. The light that passes through the mirror and split to the different image sensors. The images on the image sensors are compared and their positional relationship determined. Computers in the AF system then directs to drivers in the lens to adjust accordingly until the images match. Contrast Detection is normally used in mirror-less cameras such as smart-phone cameras. A sensor senses the intensity of light and using the logic that the maximum intensity indicates sharpness, the sensor directs the motors in the lens accordingly. Just because the camera believes that it is focused, that does not mean it has focused to what the Photographer desired. The Photographer may have to release the shutter and depress again the shutter button half way to try again. Sometimes a Photographer may attempt to focus to a different central point on the subject to see if auto focus works better.

Some AF cameras permit the Photographer to select the point of focus through touch screen or other interfaces. Take for example a tree in the foreground and a mountain in the background. In older cameras the Photographer would first focus on the tree through AF, then holding shutter button halfway, aim at the mountain and depress fully the shutter button. The mountain is centered, but the tree is in focus.

Author's perspective - For most of the micro coin photographs, the size of the area and the focus are required to be readjusted. The intended area being photographed will normally be different

requiring adjusting the primary focus of the microscope between 15 and 60x. This will increase or decrease the area that is seen through the microscope; with 60x showing the smallest possible area permissible that can be viewed with the microscope. Then the coarse focus knob is then used to raise or lower the head of the scope to optimize the focus of the intended subject to show the sharpest details possible. Both of these tasks, choosing the area viewed and focusing the subject requires Photographers manual interaction and judgment.

For photographs of full coins, the Author normally uses a Nikon D90 with a Nikon Nikkor 60mm macro-lens. The camera is mounted in a stand about 6-8 inches above the coin. Light sources illuminate the coin from the sides. The area viewed is selected by raising and lowering the camera through a rotating knob on the stand. The coin is then focused through auto-focus when the shutter button is depressed halfway down. Many times, the coin must be tilted or lights adjusted when focusing in order to achieve the sharpest details of the coin in the photograph.

For outdoor photography, the Author uses his Nikon D90 with an 18-300 AF zoom lens for all distance ranges from close-up too distant subjects, including still and moving objects. The Author primarily uses the zoom ring to get the optimal focal length for the subject, then uses the AF to focus the subject.

Legal perspective – Creativity and artistic judgment is obtained through the Photographer's choices which affect their photograph. These choices do not just pertain to what equipment and accessories are used, but also how they are used. Focusing involves choosing the field of view, magnification, and sharpness of a subject. Depending on the camera and lens used, it can present an almost infinite combination for the Photographer to choose the focal length through zooming, magnification of the subjects, the field of view in choosing the scene, and which subject to choose as the point to focus on. These decisions can greatly affect the photograph as it represents the true vision and perception of the Photographer.

In cameras that are point and shoot, which have no tools to alter or modify the focus of the image, there is no incremental contribution to the creativity; it is simply a matter of depressing the shutter button.

Many cell phones have cameras incorporated into them. Most of these have a zoom capability to magnify a subject through an interactive touch screen. The question is whether the magnification of a subject is creative in nature. On one side of the coin, magnification is a feature that can be replicated on hardware such as a scanner. If a scanner enlarges a subject on a photograph, that is normally not considered a contribution that increases whether a photograph is copyrightable. But, on the other side of the coin, if the magnification of a subject and the field of view or scene contributes to the Photographer's vision, presentation, and perception of the subject, then this aspect could be considered a contribution to the photograph being copyrightable. But if the subject is the only item in the photograph and is simply a copy of something else, such as a digital wireframe computer model of a Toyota vehicle, common Chinese plate, after-market motor-cycle lighting accessories, or simply a coin, and none of which contain incremental creative contributions to the photograph, then the magnification has no relevance to the contribution of original expression. As stated in *Meshwerks*, if the digital wireframe computer model of a Toyota vehicle by itself is not copyrightable, but if it was *"depicted in front of a palm tree, whizzing down the open road, or climbing up a mountainside"*, then it would be copyrightable. If an 1864 Two cent coin was on a white piece of paper and no

creative contributions were made to the photograph, then it would not be copyrightable. If the same 1864 Two cent coin was placed on an image containing the Civil War, when this coin was struck, then the depiction of the coin with a background of the Civil War would most likely be copyrightable. Whether the zooming capability of cell phones is an incremental contribution depends more toward whether it is part of the objective and vision in depicting the scene by the Photographer.

If a single focal length Prime lens is used, then the focal length is generally fixed with slight modifications performed through the focus ring. If the camera does not contain auto-focus capability, then the Photographers is required to look through the viewfinder and use the focus ring to obtain a sharp image of the subject or choose to create an image that is out-of-focus. This manual focus process is an incremental contribution of creativity. If the lens contains auto-focus capability, the Photographer is responsible to choose the central subject that will become the primary focus point. If there are multiple subjects in the field of view, then the Photographer can choose which subject is the primary focus point. For example, a tree in the foreground and a mountain in the background, the Photographer can choose which subject will be in-focus and which shall be out-of-focus. These choices also contribute to creativity of the photograph.

If a variable length Zoom lens is used, the Photographer first chooses uses the zoom ring to change the field of view and magnification of the subject and also the focal length and angle of view. This sets up the general scene as shown through the lens. If manual focus, the Photographer then turns the focus ring until the desired sharpness is obtained. If auto-focus, the Photographer chooses the focus point and allow the camera to focus while they observe through the viewfinder and changes as needed. The Photographer can normally choose from several focus points to have some images in-focus with others out-of-focus. These choices contribute to incremental contribution and creativity of the photograph.

The objective of the Photographer may be to have the primary image in-focus and secondary image out-of-focus. This is used to bring more attention to the primary image and also sometimes to create an environment with the out-of-focus subject. For example a couple wedding portrait photo with the couple in the center and a out-of-focus mountain in the background. The photograph can have an appearance of being mystical.

In order to Filters and other accessories can be used to dramatically affect the appearance of the image. The greater the impact and difference seen in the photograph, the higher the contribution. Filters that are simply used to protect the lens and have little effect on the image offer no contribution to the creativity. If a filter is used for all photographs, it offers less of a contribution than if considered or changed for all photographs.

6. Lighting

The primary essence in photographing a subject is proper lighting. Light is reflected off the subject through the lens and camera, then exposed to light sensitive film or digital sensors, which captures the image. Choosing the strength, distance, angle, and type of lighting based upon the subject matter, environment, conditions, and desired effect is a form of art that seeks to balance color, perception, details, and expression from the perspective and objective of the Photographer.

It is important to understand how lighting affects an object and captured by a camera. When light from a source strikes an object, some of the light is absorbed by the object with the remainder of the light reflected from it. We see an object by the light reflected from it. The percentage of light absorbed or reflected depend on many factors such as:

1. The angle the light strikes the object. Light is normally reflected in all directions from an object with the highest concentration of light normally being reflected from the object at an angle opposite it came in at. If light strikes a flat object at a 90-degree angle, it will reflect in most directions, but will primarily tend to reflect primarily directly back. If light hits an object at a low angle, it will primarily bounce/reflect off the object a low angle in the opposite direction. If you stand in front of a mirror at a 90-degree angle perpendicular to the mirror, you will see the light reflected from you that strikes the mirror and reflected back to you. If you look at the mirror from the side, you will see light reflected from objects that are at a low angle from the opposite side of the mirror.
2. The surface texture of an object.
 - a. A surface having minute irregularities will tend to absorb a greater amount of light and also tend to reflect light at different angles. For example, a matte proof coin, that was created with sand-blasted working dies that created small pits in working dies resulting in small bumps in the subsequent coins will reflect less light than mirror-like proof coins.
 - b. A mirror-like metal surface or very smooth surface will have a much greater reflective capacity. For example, a proof coin that is struck by polished working dies will contain highly reflective surfaces.
3. The color of the object. Objects tend to absorb all spectrum of colors but their own. For example, an object with green surfaces, such as most grass, will tend to absorb all colors of light, except green, which is reflected. At the two ends of the spectrum, a white object will tend to reflect almost all light, while a black object will tend to absorb a high percentage of light. If two cars are sitting in the sun, the black car will become hotter as it will absorb greater light and heat from the sun.

A combination of the above and other possible factors or environmental conditions are important to consider when photographing an image as the light reflected from an object is what the camera sees and records. As light is reflected at all angles and directions from an object, the amount of light reflected from the object will be decreased as you increase the distance from the object. As you move closer to an object, you will be able to see a higher amount of light from the object, before it is dissipated.

The environment has a great impact on the amount of light required. For example, for outdoor photography, is it bright, hazy, foggy, overcast, raining, dark, or somewhere between or a

combination of elements. Is the sun overhead, behind or in front, or is it at a low level such as during sunrise or sunset? The Photographer should take into consideration the natural lighting already present and if necessary, compensate for a lack of enough light, alter, reduce, or remove light as needed. For example, if shooting an ocean scene on a bright day with high reflection from the water, the Photographer might want to use the appropriate filter to reduce the reflection and overly bright scene. Of course if the Photographer photographed without a filter, then with a filter, the obvious differences from this choice would be clear as day.



The above photographs were taken with a Nikon D90 with a Nikon Nikkor 18-300 (left) and 18-200 (right) autofocus zoom lenses. The photograph on the left shows a 100-foot thick fog over a lake in New Hampshire right before sunrise. The timing was chosen to have enough light to illuminate the fog, but still dark enough to capture the mystic. The trees were included for size reference. The photograph on the right show a lit-up canal in Venice Italy. No flash was used as there was enough light from the boats and lamp posts to illuminate the scene and still maintain the allure of nighttime in Venice.



The photographs above were taken with a Cannon PowerShot SX510HS with natural lighting from above. The objective of the photograph on the left was to have the upper flowers reflecting greater light but have the central flowers reflect less light to capture greater and deeper colors. The objective of the photograph on the right was to use no direct sunlight to have a consistent natural flow of the velvet-like surface texture of the leaves and coloration of the flower without

being washed out or diluted from direct sunlight. These objectives are the vision of the Photographer with the choices to accomplish these goals being the incremental contributions.

The Photographer's choice of where to stand relative to the subject and light source can be important. Take for example a Photographer is shooting a football game on a bright sunny day. On one side of the field, the sun is to the Photographer's back, while on the other side it is in front of them. When the light source is in front of the Photographer, there will normally be a higher concentration of light entering the lens of the camera. The author was at his son's ultimate frisbee tournament with bright sunny skies. When photographing with the sun in front of the author, it usually took more time for the camera to autofocus the subjects and some of the subjects would appear blurry. This is more likely to the higher concentration of light entering the lens resulting in a greater difficulty to discern and focus on the subjects. Many of the players displayed less vivid colors or sharp contrast in the photographs. With the sun to the author's back, it was much easier and quicker to autofocus the subjects and the majority of photographs were sharp clear colorful images. During the evening hours the fields were highly illuminated with bright overhead lights. This created a much greater challenge, especially if the subjects were at a greater distance to use auto-focus and obtain sharp images of moving subjects. The type of light and how it reflects on a subject can affect the sharpness, contrast, and colors in the photograph.

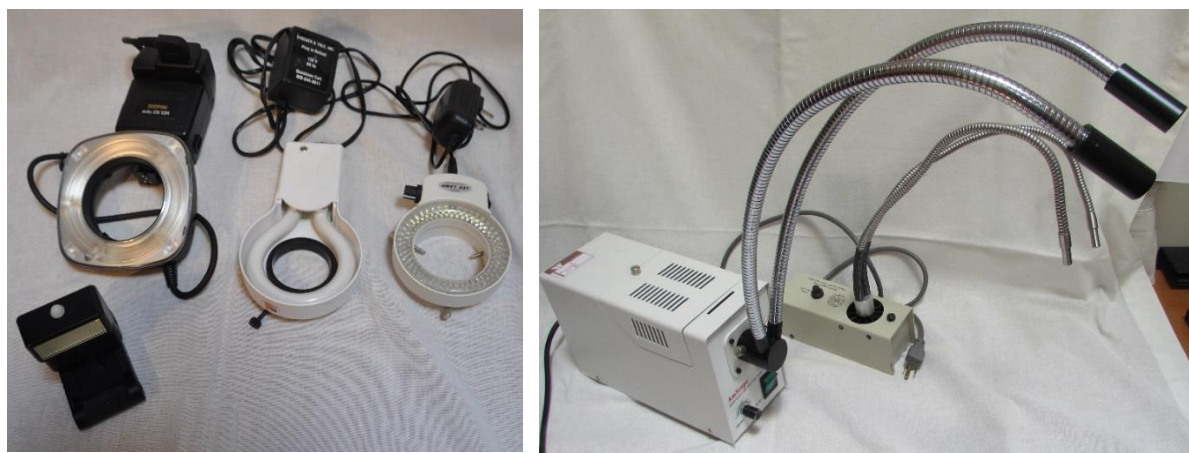


The above photographs were taken with a Nikon D90 using a Nikkor 18-300 Autofocus Zoom lens. The photograph on the left was taken with the sun to the subject's back. The center photograph was taken with the subject facing the sun. The right photograph was taken with the sun to the subject's right side. With the sun to the subject's back, the head and neck are completely shaded, and the top of the hair is overly exposed from the sun. With the subject facing the sun, the face and hair are evenly exposed and there is a shadow on the upper portion of the neck. With the sun to one side of the subject, a shadow is seen on the non-exposed side of the subject.

The relative placement of the lighting to the subject can provide significant differences. Illuminating the front of the subject can normally be used to obtain the best details with little or no shadows. When the light source is placed from the side, it can be used to create shadows on the opposite side of the light source, which can be used to create depth. The placement of the light on the side or moving the subject can be used to control where the shadow falls. With the light behind the subject, less details are seen on the front of the subject and more of a silhouette of the image is seen. Backlighting can be used for special effects, such as giving a hallow effect

around the image. Also for backlighting, the exposure can be increased to increase the time to capture light from the subject. This also has a side effect of over exposure of the backlighting. Another method for compensating for backlighting is to use a flash to illuminate the front of the subject. For example, if shooting a portrait with the sun in the background, using a flash can help see the details of the front of the subject.

There are also many types of lighting to illuminate a subject. A hard light, which is normally a smaller brighter light can be used create greater contrast and sharpness in the subject. There will also be a minimal transition between the area illuminated and the shadows. If positioned incorrectly, such as high above the person, deep shadows might be created under the eyes. Positioning the light correctly will avoid most problems. A soft light, which is normally a large light source, creates a smoother transition between the areas illuminated and the shadows. This effect will show less sharpness and details, but the image will have a nice flowing transition throughout and a softer mood will be created. A flash aimed outward towards an open umbrella can be used to create a soft light source by diffusing the light from the flash through bouncing and dispersing the light to a large area. In the outdoors, direct sun light can be used as a hard light source while a cloudy day, when light is dispersed, sun light can be used as a soft light source.



The photographs on the left show two light sources that can be added to the front of the lens of the camera with another that can be added to the microscope. The photograph on the right show light sources that can be focused on a particular area of the coin or other small subject, one of which has an adjustable power level for the light. The placement and control of these light sources will greatly affect how the subject is illuminated in the photograph.

Author's perspective – Lighting is especially important in photographing coins. For photographing through a microscope, the choice of using a halogen ring light is optimal for several reasons such as it provides an even light source surrounding the zoom lens, illuminating all aspects of the subject matter. The halogen light offers a non-glare light source, which is helpful, especially in photographing proof coins and coins encased in plastic. The halogen lamp is secured to the zoom lens through a tightening screw. Many times in photographing coins, the halogen lamp is held in the hand to angle the lighting on the subject matter accordingly. Other times parts of the light from the halogen lamp is blocked to create shading at a specific location.

In photographing micro elements of a coin that are very lightly struck and have little edge or outline, or hidden in design elements, normally requires choosing proper angling of the coin and lighting to create the proper optimized image.

Many times, a secondary light is required to create the desired effect. This is especially true on secondary design elements that are hidden within other design elements such as digits that are punched into the denticles or doubling of design elements that are very close to the primary design elements. Choosing a light that can be angled and placed close to the subject can illuminate the subject matter or be used to illuminate a secondary part of the subject. For example, using the primary light to illuminate the top of the design element and using the secondary light source to illuminate the sides of the design elements can be used to present a much greater area of the subject matter and create a three dimensional effect by showing the depth of the secondary image and also clearly show the separation line between the primary and secondary images.. For a secondary light source for micro-photography, the author normally uses an Applied Scientific Devices Corp Eco-Light 20 Fiber Optic Light Source, which has two fiber optic focused light sources, which can be bent, angled and moved to the proper distance to the subject matter. These light sources are normally manually moved and adjusted for each photograph.

Complicating matters is that most of the rare coins that are photographs are encased in plastic by third party grading services. The lighting must be adapted accordingly in order to compensate for any glare caused by the light hitting the plastic. One of the greater challenges in micro coin photographs are details/images which are only extremely lightly present (little depth) on the face of the coin and barely have any edge, which to bounce light and create an outline to the image can take hours of finding the correct lighting and angle.

For full photographs of coins, the Author normally uses a Nikon D90 with a Nikon Nikkor 60mm macro-lens. The camera is mounted in a stand about 6-8 inches above the coin. Light sources illuminate the coin normally from four sides. The reason the author uses four light sources is that the author has found through experience that if only two light sources are used, they are normally spots on the coin that are not illuminated evenly and appear darker in the photograph. The author normally uses two light sources, the first is an Applied Scientific Devices Corp Eco-Light 20 Fiber Optic Light Source, which has two fiber optic focused light sources, which can be bent, angled and moved to the proper distance to the subject matter. The second is an AmScope Series Haloid Lamp 150w that has an adjustable illumination control.

The light sources are adjusted depending upon the coin, for example, copper coins normally are illuminated differently than silver and gold. Adjustments are also made based upon the luster, brilliance, and condition of the coin. For example, for a proof coin that displays reflective surfaces, a lower angle might be used for the light sources. For a dull surface, a higher angle might be better.

The area viewed is selected by raising and lowering the camera through a rotating knob on the stand. The coin is then focused through auto-focus when the shutter button is depressed halfway down. The coin must be tilted or lights adjusted when focusing in order to achieve the sharpest details of the coin in the photograph.

The author has found that the best light source, especially for full photo copper coins is the sun. The author has set a station in the middle of the street, usually around 11 AM, when the sun is angled slightly down and position the coin and camera so that the light reflects off sun and captured by the camera. Brown copper coins can be made to appear as if they were red in color.

The below photographs were taken with a D90 using a Nikon Nikkor 60mm macro lens. The coin is an 1865 Proof Cameo Two Cent coin. The photographs show a sequence of increased lighting to show the differences and their benefits.



The above left photograph shows the D90 and 60mm macro lens in a stand positioned above the coin. The center photograph shows the coin with no flash. The right photograph shows the coin when the camera flash is used.



The above photographs show the addition of a Scientific Devices Corp Eco-Light 20 Fiber Optic Light Source being used through two focused lights that were adjusted by hand while viewing the coin through the view finder. Notice that primarily the central design elements are reflective.



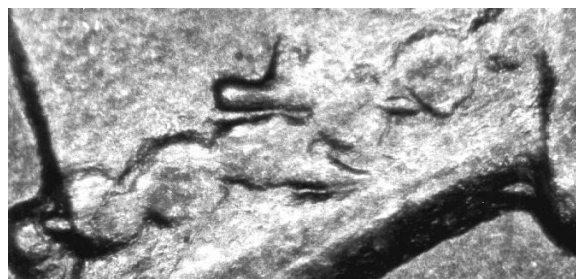
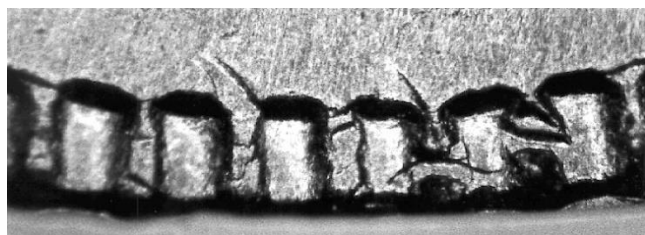
The above photographs show the addition of a Scientific Devices Corp Eco-Light 20 Fiber Optic Light Source and an AmScope Series Haloid Lamp 150w that has an adjustable illumination control. Both sets of lights were manually adjusted. Notice that most of the design elements on the coin have reflective surfaces. The above coin photographs would most likely be copyrightable based upon the choice of camera, lens, lighting, focus, posing of the coin, and manual adjustments to the lighting.

In understanding the effect each light has on the surfaces of the coin helps in determining which combination of light sources are most effective in meeting the objective of the Photographer. Other light sources have been tested for full coin photography. For example, in using a ring flash in front of the lens, the surface of the coin was over illuminated and dull. Silver and gold coins normally required less illuminated; requiring the light sources were moved further away from the coins.

For many of the thousands of close-up coin photographs taken by the author, a Edmund Scientific 15-60 zoom microscope was used with a halogen ring lamp around the lens. The halogen ring lamp was useful as it is a non-glare light source that comes evenly down around the lens of the microscope. Without the use of a camera mounted lens, most of the controls of the camera were non-functional. For many of the photographs, the coin was tilted to create the appropriate shadows. Sometimes a secondary light source, such as the Scientific Devices Corp Eco-Light 20 Fiber Optic Light Source was used. B&W 400 speed film was normally used for high contrast in low light environments.



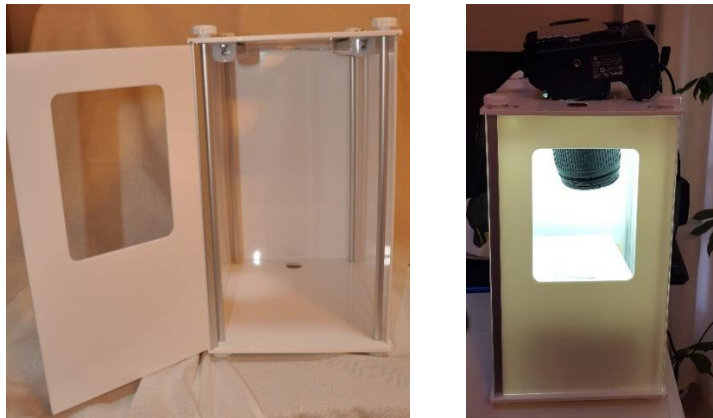
The above photographs show an 1870 Indian cent in a plastic case under the Edmund Scientific 15-60 zoom microscope with a halogen ring lamp with a Nikon 2020 camera with an adapter attached to the viewer. The photograph on the left shows the coin flat. The center photograph shows the coin tilted. The photograph on the right shows the coin tilted with a secondary light source.



The photograph on the left shows multiple digits of the date struck into the denticles of an 1870 Indian cent. The photograph on the right show multiple digits of the date struck into the necklace of an 1882 Indian cent. The photograph on the left represents approximately 1/10 of an inch across the bottom of an Indian penny. The close-up photographs taken would most likely be copyrightable based upon the choice of camera, film, microscope, manual zooming of the microscope to focus, choice and control of lighting, and the posing of the coins.



The photographs on the bottom of the previous page are of an 1863 pattern Aluminum Two Cent piece (Judd 318). The coin was believed to have been struck after 1870 based upon diagnostics seen on the reverse and die rust seen above the A of STATES and through RICE of AMERICA. With the die rust being so shallow, the aluminum surfaces highly reflective, and the coin encased in a plastic holder, it took the author several hundred photos and a month to capture these and other images. It required experimenting with new light sources, creating the proper shading, combined with the proper tilt.



The above photographs are another example of a controlled light source is using a white box with light sources on top illuminating downward, shelving to control the distance from the camera lens. This permits a almost constant equally distributed light source on a subject.

Legal perspective – As the essence of a photograph is based upon the transmission and capturing of the light reflected off a subject, then the understanding, consideration, and possible control of that light is normally a critical contribution to the objective of the Photographer in creating the photograph.

As stated by the defining case laws in *Meshwerks*, *SHL Imaging*, *Schrock*, *Art Rogers*, and *Schiffer Publishing*, the Photographer's choices of lighting in the taking of a photograph is an incremental contribution to the creativity and artistic judgment of the photograph. The level of contribution is primarily based upon two elements: The Photographer's choice of lighting based upon their vision and objective; The degree that the lighting affects the photograph.

If the Photographer uses an automated flash that is part of the camera and the flash is automatically controlled by the camera based upon the environment, then there is little to no incremental contribution for lighting by the Photographer, besides choosing a camera with the right flash attached. If the Photographer simply chooses to turn an internal or external flash on because of the environment, such as it being little to no light, then the choice of using a light offers a minimal contribution. Compare this to using a light source bounced off an umbrella in order to create a soft light in a portrait. In the first scenario, the flash generates direct light to the area of the subject in direct line of the flash, while those areas not in direct line will be darker. In the second scenario, the soft light will create a very flowing transitional shadows and great depth of the subject in the photograph, while without the soft light the front of the subject will be evenly lighted depending upon the lighting already present. In addition to both scenarios

creating light to permit the camera to capture the light reflected from the subject, the second scenario has a much greater creative element and specific objective, which also must be considered in its contribution. This is another reason that it is extremely difficult to set absolute rules and uniform test in determining a photograph's originality.

If the photograph does not reflect the Photographer's decisions and choices in choosing the lighting, then the choice of lighting offers little to the incremental contribution. On the other hand, if the photograph reflects those decisions, then the incremental contribution level is higher. The "decisions by the photographer - or, more precisely, the elements of photographs that result from these decisions are copyrightable. See *Schiffer Publishing Ltd.* In assessing the originality of a work for which copyright protection is sought, we look only at the final product. The original depiction of subject, which reflects the photographer's decisions and judgment in creating the photograph is copyrightable. See *Meshwerks*.

An example of lighting being used as an incremental contribution to the Photographer's choices are seen in *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000), the Court stated regarding originality:

Originality analysis in this case begins with Lindner's description of his creative process. Lindner carefully chose to use single light source with a "reflector to fill out the shadows" in order to "give a chiaroscuro effect that would wrap around the [the frames] and give [them] depth." (Lindner Aff. ¶ 15.) He used this lighting technique because "copy lighting" would "wash out the shadows and impart a flat look." (Lindner Aff. ¶ 15.) Lindner also employed artistic judgment in determining the amount of shadowing for each individual frame that would emphasize the detail without obscuring it. (Lindner ¶ 15.) Reflections in the mirrors also complicated the shoot and led to the creation of a "unique light design on a reflector that would appear in the mirror without showing any part of the room or [himself] in the mirror." (Lindner Aff. ¶ 16.)

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding choices made in choosing the lighting as an incremental contribution to the creativity:

Fourth, each photographer arranged and changed lighting to produce desired effects, such as reducing shadows, portraying color, highlighting texture, or emphasizing stitching patterns. (Shih Dep. at 69; R. at 129-30, 163, 248-50 (Aug. 23, 2004).)

As with all other incremental contributions, the Photographer should be able to articulate the vision and objectives in the judgment and choices they made and demonstrate how the photograph reflect those choices.

7. Posing and Timing

The objective of a photograph is normally to capture the image of a scene or subject. Probably the most common and fundamental element in the Photographer's choices is how to pose the subject in the photograph. If you use a cell phone with a simple camera or a point and shoot camera with a simple lens, auto-controlled, shutter-speed, focus, and all other elements that form a basic camera, which has no other options and choices for the Photographer to modify, the one pure element remaining is the choice how to position the subject to the photographer or vice versa.

Think of a taking a photograph of a family vacation at Disney World, choosing the background scene to show where you are, positioning your family members accordingly relative to the background and each other. A family portrait in front of the Christmas tree, first day at school, a parade, concert, sports event, a new puppy, Halloween, new house, moving out of your old house, your kids in different outfits, and an almost infinite list of other events that you might wish to capture to remember throughout your life. It might become second nature on how to pose the subject, combine different elements within the scene, photo the subject multiple times to have choices in the best, add props or other things to add history or a story to that event. All of these add to the vision and objective of the Photographer and their choices in creating or photographing a scene.



The above photographs were of the author's family at Disneyland. The photograph on the left was taken with the focused camera sitting on top of something using a delayed timer to take the photograph. This photograph is copyrightable based upon the selection of camera, focus, and posing of the scene.

Sometimes a scene can be created or presents itself to a Photographer, such as a sunset, while other times it requires great patience to materialize. When viewing the top National Geographic photographs each year, many of the Photographers stated they sometimes waited for days and sometimes weeks for the perfect event, environment, subjects, and all other combinations to evolve and come together to create the perfect photograph. This is all part of the creative essence and artistic judgment that is used to capture that which the Photographer desires in the image they capture. Beauty of course is said to be in the eye of the beholder, with different

individuals possibly having different perspectives of an image. This is part of our human nature, to determine for ourselves what we find aesthetic.



The wildlife photographs above were taken with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens. The photograph on the left shows a caribou at Denali National Park in Alaska. The author positioned himself slightly ahead of the caribou on a road about 40 yards away. Many photographs were quietly taken while the caribou was grazing, with this photograph being the best body, head, and antler position of the caribou from the author's perspective. The photograph on right shows a striped marlin being caught while fishing in Cabo San Lucas Mexico. The author watched the marlin through his camera, manually focusing to the area of the marlin until the marlin jumped, then choosing the moment when the marlin was fully airborne to take the photograph. These photographs would most likely be copyrightable based upon the selection camera, lens, focus, setting of the perspective and scene, and in the timing of the photographs.



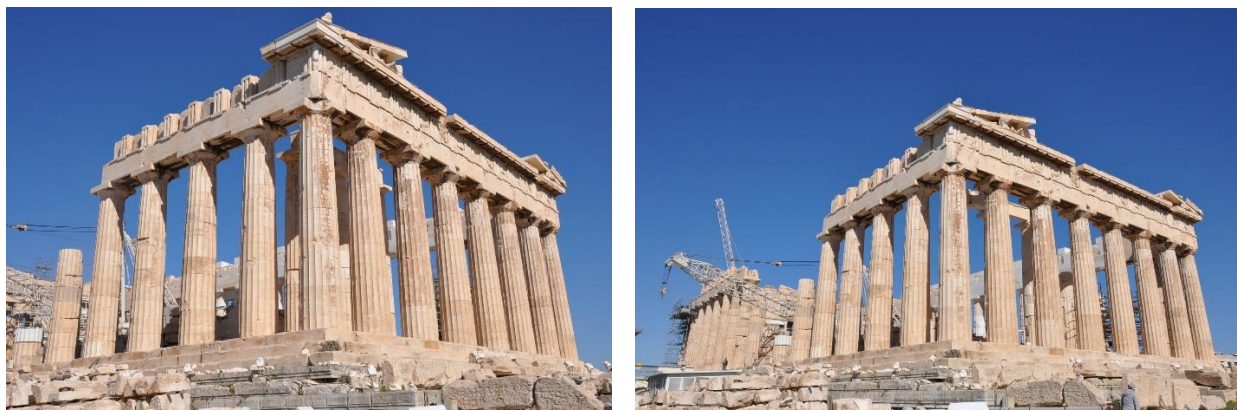
The scenic photographs above were taken with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens. The photograph on the left shows ice calving from the Aialik Glacier in the Kenai Fjords National Park. The author viewed the glacier for about an hour through his camera, waiting for the right moment and then focusing on that area where movement was seen, taking over a hundred photographs of different calving events. The above two photographs were some of the better photographs captured. These photographs would most likely be copyrightable

based upon the selection camera, lens, focus, setting of the perspective and scene, and in the timing of the photographs.

Sometimes the objective of the Photographer is to capture the emotion, passion, feeling, or expression of a subject. For example, a team that just won or lost a championship. The expression captured can almost make the viewer feel the emotion that is captured. When we think of works that captured expression, probably one that comes to mind first is the Monalisa, a painting by Michelangelo. Monalisa has a smile that is so simple, yet so alluring, that it creates curiosity, admiration, intrigue, mystery, and other thoughts regarding why she is smiling and what was her presence of mind.

A Photographer might have multiple objectives in their photograph. For example, a Photographer at a coin show wants to capture the size of the show, the number of people there, kids at the show, if people are excited in finding the coin they desire, busy tables, and so on in order to capture the excitement at a major show. The Photographer will attempt to find the right perspective to capture what they find critical to the expression they wish to portray in the image.

The Photographer's choice in posing or capturing the scene is one of the most basic elements and concepts in photography. It is their perspective in what they see and capture in the image. The story in which they tell through a visual representation. This is also one of the core incremental contributions and one which can usually stand on its own to meet the creativity requirements of copyright protection.



The above photographs of the Acropolis in Athens Greece were taken with a Nikon D90 using a Nikon Nikkor 18-200 autofocus zoom lens. These photographs show two different perspectives of the author. The photograph on the right shows the entire Acropolis, including the two large crane in the middle and back that were working on supporting the structure. The objective of the photograph on the left was to show the primary structure of the Acropolis with as little of the modern-day tools as possible to show the marvels of the ancient world in all their glory standing through the test of time. To accomplish this the author, changed his perspective by moving left and closer to the right side of the Acropolis and altered his focus to enlarge this part of the building. This is the same as posing the subject by changing the author's position relative to the subject.



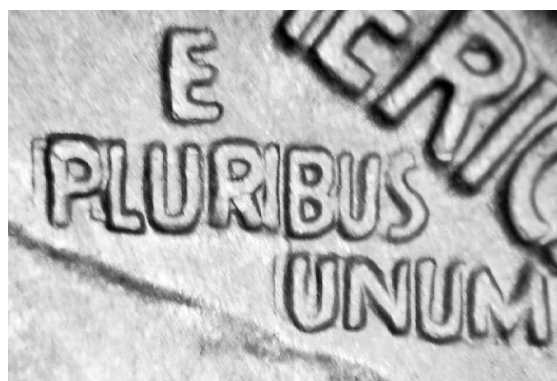
The above photographs of the Colosseum in Rome were taken with a Nikon D90 using a Nikon Nikkor 18-200 autofocus zoom lens. The objective of the photographs was to show the sheer size and magnitude of this ancient wonder. The author positioned himself from a higher and backed up perspective to capture as much of the Colosseum as possible. In addition, people were included in the photograph for size comparison.

Author's perspective – One of the most important aspects in coin photography is the posing of the coin. This is especially true when photographing die varieties. The secondary images being photographed are sometimes lightly struck, show only small partial remnants, and are sometimes hidden by other design elements. If the coin is simply laid flat when photographed, many of these secondary design elements are difficult to see and photograph. By changing the posing of the coin, primarily through angling of the coin, a greater area of the die variety is visible. Take for example a die crack, which is a crack into the working die and is seen as a raised crack on the coin. Most die cracks are very thin. By tilting the coin and viewing the die crack, you are viewing the side of the die crack, which is normally wider than the cross-sectional of the die crack, therefore a greater area to photograph. Posing of the coin at the proper angle and perspective combined with choosing the proper angle to reflect the light source on the design element will produce optimized photographs that better display the secondary image or intended design elements or diagnostics. The posing of the coin is normally changed between each photograph primarily through rotating and tilting of the coin to photograph a different area of the coin. Tilting of the coin also presents the photographer challenges when choosing the proper focus as the area of the coin being photographed will be at different depths of view.

The author attends his son's ultimate frisbee tournaments and usually takes several hundred photographs for the team, including portrait photographs of the team. During portrait photographs, after the normal team shots, the author would pose the team for fun and sometimes strive for special effects photographs, such as the team members doing something silly or using a fisheye lens with the team standing around the author in a half-moon alignment. Most of the photographs are of action shots during the game, capturing incredible fast moving action shots. The author watches the game through the camera with a finger on the shutter button, photographing when the right event occurred.



Example for macro photography of coins - A Two cent coin has a diameter of 22mm or .826 inches. As seen in the photograph above on the left, the width of the date at the bottom of the coin is approximately .1 (1/10th) of an inch. As seen in the photograph on the right, the distance between the denticles (raised lumps around the circumference of the coin) as seen above is approximately .01 (1/100th) of an inch. These photos show the top of the digit 6 going across two denticles. Notice also the three dimensional aspect of the images, whereas you can see the sides of the digit and denticles, and determine the depth of the digit that was struck through the denticles and that the date punch was tilted slightly to the right as the right side of the top of the 6 in the denticles is stronger than the left, which required additional lighting from the top of the coin. In order to photograph this image of the digit in the denticles and create the 3-dimensional aspect, the area of the denticles must be tilted, focused, and illuminate accordingly. Most times the coin must be tilted accordingly in order to change the angle and optimize the lighting and focus. Tilting the coin also presents the challenge of focusing the details of an object that are at different depths from the microscope lens. A picture like this may take several minutes to take. Sometimes several photos are taken to attempt different perspectives of the subject matter, such as tilting the coin at different angles or rotating the coin around to get a different perspective.



The photographs above show two Buffalo nickel doubled dies. A doubled die occurs when the working die used to strike a planchet contains two or more images of the design elements. The photograph on the left shows a 1929 Buffalo nickel with doubling seen on the date. The secondary weaker images are seen to the southwest. In the photograph on the right, doubling is seen on PL of PLURIBUS and UN of UNUM on a 1930 Buffalo nickel. The secondary images are seen to the east of the primary images. To optimize the distinction of the primary and

secondary images, the coin needs to be tilted, with the secondary images on the downward side. If the coin is laid flat, little division is seen between the primary and secondary images. If the coin is tilted with the secondary weaker images upward, the light hits the sides where the metal of the two images meet and become blurry. By tilting with the weaker images downward, then a shadow is created which makes the distinction more visible. The coin on the left would be tilted with the bottom right edge of coin downward. The coin on the right would be tilted with the left side downward. These photographs would most likely be copyrightable based upon the selection camera, microscope, manual focus, control of lighting, and the manual tilting and posing of the coin.



The photograph above shows how a coin can be tilted in order to obtain the best photograph. The Photographer starts with the coin flat, then raises the appropriate side while viewing the coin. This involves tilting the coin until the best view is seen. By tilting the coin past the best view, the Photographer can ensure that the optimal angle was obtained. Something is placed under the coin to hold the coin at that angle while the photograph is taken.

Legal perspective – One of the first questions is whether just posing the scene, with no other incremental contributions, would be enough to qualify a photograph to be copyright protectable.

The United States Supreme Court stated in *Feist* that the work must possess a minimal degree of creativity. The United States Supreme Court further defines the level of creativity required as extremely low, even a slight amount will suffice. The Court stated in *Schrock* that the original expression may be found in the staging and creation of the scene depicted in the photograph. Federal courts have historically applied a generous standard of originality in evaluating photographic works for copyright protection. No photograph, however simple, can be unaffected by the personal influence of the author. The Court stated in *Perfect 10, Inc.* that Photographer's images were "creative in nature" and thus "closer to the core of intended copyright protection than are more fact-based works. The Court stated in *Schrock* that there were normally only two exceptions when a photograph is not copyrightable, these are when a photograph replicates another work with total or near-total fidelity and those characterized as slavish copies.

Given these fundamental criteria, then the Photographer's posing of a subject or scene would qualify as an incremental contribution, which by itself would normally be enough to qualify for copyright protection.

If the photograph is not through the Photographer's eyes, then the image is more likely not copyrightable. For example, let say the objective is to photograph every house in a town. A camera is mounted on top of a car and as the car drive down a street, the camera knows through software and other tools when a house is in its sight to capture. The photographs produced are more likely not copyrightable as there was no creativity in creating them. This scenario was more towards an automated process to photograph houses. A photograph of a photograph or painting would be the same as a slavish copy and not copyrightable. A photograph of an after-market motor cycle part with the objective of exactly replicating the part with total or near-total fidelity is not copyrightable.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding choices made in taking multiple photographs and choosing the one based upon which appeared which image was closest to the Photographer's vision of the subject as an incremental contribution to the creativity:

Fifth, all of the photographers engaged in "bracketing" – taking multiple photographs of each piece of fabric and then choosing one based upon the expression they wanted to evoke. (Shih Dep. at 87-88, 143-44; R. at 165-66, 252 (Aug. 23, 2004).) In the words of Joy Shih, the decision of which picture to use was made according to "which image would project what I was trying to get [the fabric] to look like." (Shih Dep. at 87.)

In *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000), the Court stated regarding originality:

There is no uniform test to determine the copyrightability of photographs. See, e.g., Burrow-Giles, 111 U.S. at 60, 4 S.Ct. at 282 (considering pose, selection and arrangement of costumes, draperies and other accessories, lighting and shading); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (emphasizing photographer's "inventive efforts" in posing couple holding improbably numerous puppies between them, and photographic printing); Gross v. Seligman, 212 F. 930, 931 (2d Cir.1914) (considering pose, background, light, and shade);

One of the most common and creative contributions to a photograph being copyrightable is the vision and perspective of the Photographer of the scene and subject.

8. Image Conversion and Digitization

When a photograph is captured on film or slide, that is not the end of the possible enhancements and creativity that can be done to the image. For example, changes to the image can be made when the negative is developed, or the photographs or slides are digitized.

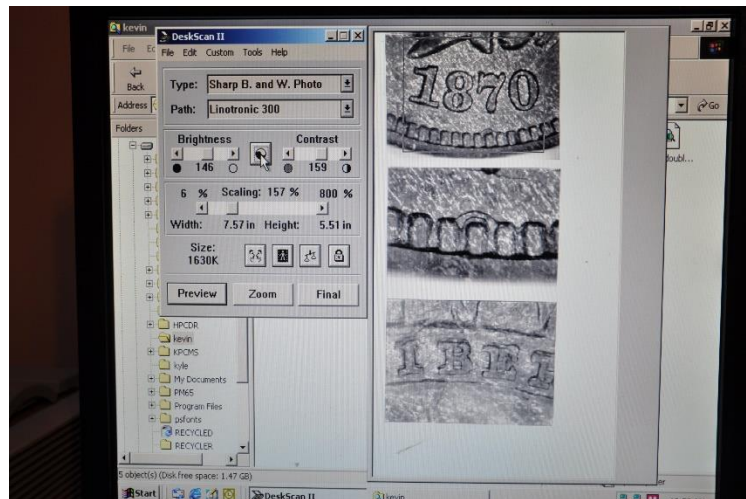
In the old days, the photograph would normally be sent to the Printers and inserted into the book accordingly. With the advent of scanners and other tools to digitize photographs, the photographs can be converted into a digital image and inserted directly into the book, magazine, web page, or anywhere else.

A digital image is normally made of dots that are combined in a manner that replicates an image. The number of dots per square inch (DPI) defines the maximum number of dots per square inch. The greater the number of dots per square inch, the greater detail that can be obtained. If there are a greater number of dots per square inch, then smaller dots are used. Combining a greater number of smaller dots can provide for a smoother transition and appearance of an image. For example, put ten marbles in a row, which appears like a series of circles. Now take 100 marbles, each one-tenth the size of the large marbles and stack together to form a line the same width as the large marbles. The sides of the line of small marbles forms a much straighter line than with the large marbles. Many jpeg images are 75-150 DPI, tiffs are normally 200-300 DPI, and printer quality for books is normally 2450 DPI. The greater the DPI, the larger the digital file, which brings into consideration storage space. It is also important to consider the proper DPI for how the image appears in your book, web page, or paper. If you desire greater detail in the image, then a higher DPI is normally required. There may be a balance between a large image and lower DPI so that the image will refresh quicker if on a webpage. If a lower DPI is used to decrease storage, and the image is converted to a higher DPI for use, it is important that the image is optimized so that there is little degradation to the quality of the image. So for example, storing the image at 200 DPI and printing the image in a book at 2450 DPI. It is always good to experiment and test scanning, conversion, and printing of an image in the beginning when first developing a process.

When a photograph is scanned, the scanner maps the location, density, color, shade, and other attributes of the photograph and uses an algorithm in the software to place the dots accordingly to emulate the photograph. The quality of the scanned image can greatly be affected by the scanner and the software used to scan the image. Different scanners could process and interpret the photograph differently and different software could place the dots differently. An image could easily appear darker or lighter depending upon these tools. Also there might be differences produced for color photographs, such as the degree and variation of colors, transitions between different colors, shades, and so on. Different scanners and software will more than likely produce different results in the image. In addition, the software may be optimized for specific printers and other output types; picking the correct configuration is important in producing the best results. The level of detail might also be a consideration when choosing the right tools. The images on coins are usually simple with clear distinct details, smooth transitions, and generally consistent in color; which should normally only require a simple scanner and software. Some images are more complex in nature and may require tools that can capture those details, colors, shades, and transitions that are necessary to accurately represent the image. Choosing the right

scanner and software can almost be as important as picking the right camera and lens. Choosing the right tools can enhance the images, whereas choosing the wrong tools can greatly degrade the quality of the image.

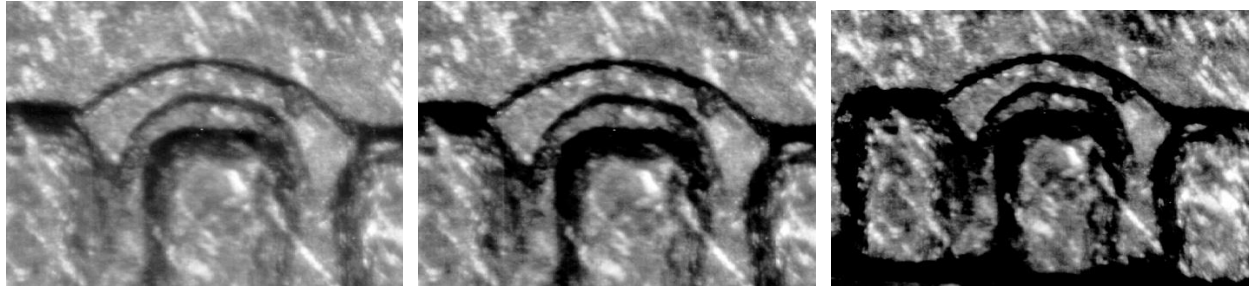
The application the images are used in such as Microsoft Word or Adobe InDesign can greatly affect the presentation of the images. If printing the images, the printer type can also affect the image. Taking the same image and placing it in different applications is the best way to see if there are any differences; the same is true in trying different printers. Sometimes the best solution when planning a project is to start at the end to define the beginning. For example, if you are writing a book with images, create one page in the application with images included. Create a PDF of the page and print to the intended printer or send it to the Printing firm that you want to consider and ask for the resulting printed image. If the images do not come out as expected, modify the images accordingly and repeat and improve the process. In determining the best results first, you do not have to redo all images if the images are not optimized.



The above photograph on the left shows 3 photographs on an HP ScanJet IICX scanner. The photograph on the right shows the GUI software interface to the scanner seen on the computer. There are many options, some of which are generalized, such as the Type of photograph, whether it is color or black and white. The Path indicates the output device that the image is being optimized for; the author uses primarily Linotronics 300, which is the negative image writer used by the author's Printers. There are also other image controls such as scaling to change the size of the outputted photograph, brightness, and contrast controls.

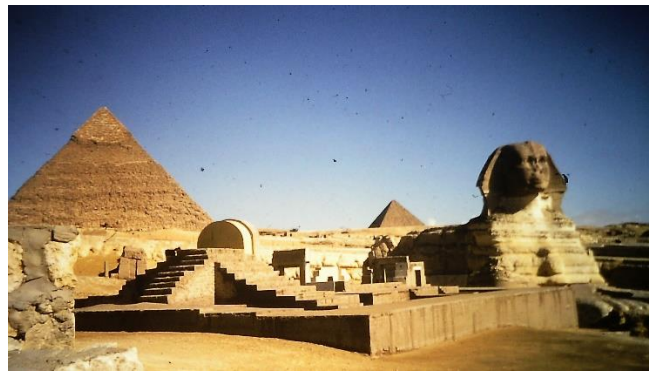


The scanned images at the bottom of the previous page are of the Golden Gate Bridge in San Francisco. These were scanned with three different Types selectable through the GUI scanning software. The image on the left shows a Type of Millions of Colors selected. The image in the middle is of the Type Sharp Colors and is much less detailed than the Millions of Colors image. The image on the right is of a Type Sharp Black and White image. Selecting the right Type of image based upon the objectives are important. If the images are to be in a book that only has B&W, it is better to put the digital images in the right format so there is not conversion done when the book is actually being printed.



The above images show the scanned photograph of a 0 above the denticles on an 1870 Indian cent. The image on the left shows the default image selected through the software with a contrast level set to 164. The center image shows the 0 with the contrast adjusted to 174; notice the darker outline to the 0, which creates more of a definitive border. The image on the right shows the 0 with a contrast adjusted to 177; many elements of the image have become dark. From the author's perspective, the middle image is the best example to meet his objective for showing this die variety to the reader. It presents a sharp and detailed shape of the 0 above the denticles that has a clear and distinct outline. These adjustments are the choices through the scanner software that are used to improve the photograph to meet the Photographer's vision of the image. An important aspect of the analysis on why these changes are part of the incremental contributions are: 1. The Photographer can articulate the objective of the choices; 2. The Photographer can demonstrate these differences in the resulting image. In addition, these changes were made to each photograph individually based upon the look and feel of how the changes affected the image and whether they met the intended objectives.

Another medium photographs were often taken on 35mm slide film and converted to transparent positive image slides. Slides were popular in the 1950s through 1970s. There were often stored in a carousel and displayed in a projector. The best advantage is that they can be viewed by multiple people simultaneously. Many times, during my childhood, we would go to my grandparents house to watch home movies and slides from their lives and experiences.



The photograph on the left shows a slide carousel that can be used in a projector to display the slides in sequence. On the right side of the left photograph shows a converter that can be used to display and convert a slide to a digital image. The photograph on the right shows a slide image of the Sphinx and primary pyramid in Egypt that was converted to a digital image.

Author's perspective – The Author has photographed and scanned over 20,000 images. He normally scans them to a tiff file at 200 DPI. When scanning, the author adjusts each scanned image manually to crop the image to choose the primary focus, size the image to the intended size for the book it was being used, and also adjusted the contrast and brightness to improve the details and create lighter images that will less likely have problems when being converted from one medium to another.

The author uses a HP ScanJet IICX scanner for scanning photos, its 28 years old, but when comparing to any scanner over the years, it proved to be much better in the quality of digital images it produced. This scanner uses a rounding curve that makes the curves and lines in the image appear as they did in the photograph. With some scanners the lines are broken and appear as a sequence and combination of dots; if you look closely at images in a newspaper, this becomes more evident.

In the author's first book on coins in 1994, the contrast and brightness were not modified when the photographs were scanned. The images appeared normal, generally appearing like the photograph when seen through Photoshop and in the Adobe PageMaker files. When the Printer printed the book, the images were about 25 percent darker. This was caused when the PageMaker files were converted by the company printing the books to a negative imager writer at 2450 dpi, the images were also converted to a higher resolution using software which calculated the image in the intended DPI. This normally meant increasing the number of dots in the intended image; which can tend to darken an image.

The author switched Printers for his second book to fix the darkness problem. The first test draft still had 25 percent darker images. The Printers provided the author with a new library that helped optimize the scanned image so that there would be less degradation when converting from 200 dpi to 2450 dpi. The author also manually adjusted each image to increase the contrast and brighten the image more. The Printers created another test draft with these adjustments and greatly improved the appearance of the images in the output. These changes were used for all books since. This was not a problem when printing to a 600 DPI printer normally purchased through stores, only when converting to high resolution printers.

If the photographs are in color, then the scanner could be used to convert the photograph to a black and white digital image if needed. This conversion from color to black and white could be done through the scanner or post processing software.

Legal perspective – Film cameras normally are used to capture the image of a subject to film, then the film is developed to create a photograph. Most individuals will have the photographs developed through a processing center. Some more advanced individuals have the dark room and capability to develop the photographs from the film themselves. For most photographic images, the Photographer might need to digitize them to incorporate them into a book, webpage or through some other presentation medium. In digitizing a photograph, there are many enhancements that can be made to the digital image during this process.

The scanned image of the original photograph is considered a derivative work of the original photograph in a different medium. If the original photograph is copyright through the creative artistic judgement of the Photographer, then those incremental contributions of the original photograph are also applicable to the scanned digital image. If creative enhancements are added when scanning the photograph, then the scanned digital image will also be copyrightable based upon these additional incremental contributions that are not seen in the original photograph.

If an individual is processing the film to create the photographs, it is always possible for them to enhance the image. As stated by the Court in *SHL*, “*Even the strength of the developing solution can alter the grain of the negative.*” If the objective of changing something is to enhance the image to meet the vision of the Photographer, then that choice goes towards the incremental contribution of the copyrightability of the photograph.

What if the Photographer hired a third party to develop the images and the third party made changes to the development of the negative to the photograph which enhanced the appearance of the photograph. Would those changes add to the incremental contribution of the Photographer? If the third party made the changes on their own then the contributions would not be part of the judgment of the Photographer and therefore not be part of the incremental contribution and creativity of the Photographer. If the third party was following the instructions and choices made by the Photographer, then they are part of their vision and objective for the image and are therefore part of the incremental contribution of the image being copyrightable.

When digitizing an image from a photograph, the choice of the scanner and software can be an important component in improving the quality of the digitized image. Do these add to the incremental contribution of the image though? If choice of scanner and software is simply made for example because of costs, size, general likability of a brand name, then the answer is more likely no, it does not add to the incremental contribution. If the Photographer chooses the scanner and software to meet their objectives and vision of the image, then these choices should be part of the incremental contribution. The Photographer should be able to articulate the problems encountered and solutions derived through the choices made in picking the proper tools to scan the image. For most individuals, the same scanner and software would be used to digitize all of their images, so this contribution might be less than if there were multiple scanners or software to choose from.

If the image scanned is the original subject and no creative enhancements were made to the image when scanning, then the image is not copyrightable based on the image is simply a copy

of the original. Works that replicates another work with total or near-total fidelity are not copyrightable, see *Schrock.s*.



The 1886 One Dollar bill was placed on the scanner and scanned into a digital image. The resulting image is not copyrightable as it is simply a replicate of the original subject with no creative enhancements added.

While scanning the photographs the author normally will select a portion of each photograph to save as the digital image; also known as cropping. The general purpose of cropping is to take a portion of a photograph and make it the centralized focus of the viewer. Up to three photographs are laid on the glass of the scanner under the cover. The images of the photographs are seen through a software GUI interface connected to the scanner. This GUI first creates a rectangular box around all images. The User adjusts grabs the sides of the box with their mouse and moves them accordingly, permitting the User to select an entire photograph or select a specific rectangular area in a photograph and save only that portion of the photograph. The author normally chooses the appropriate area and size for each image to display the appropriate area of the photograph that shows the intended die variety or diagnostic and also is sized to fit in the author's books in a consistent manner. On one side of the coin, the cropping of the photographs is for the purpose to centralize the viewer's attention and focus on specific areas of the photograph. On the other side of the coin, cropping does not creatively enhance the image. Therefore, if there is any incremental contribution to cropping, it is very minimal if any. When resizing of the image is for the purpose of create a consistent size to be used in the book, then this is more towards a process rather than adding to the author's objective and creativity to a photograph to enhance the image's presentation.

When digitizing a photograph through a scanner or other tools, if the quality or artistic nature of the image is enhanced during the digitization to meet the objective and vision of the Photographer, then these add to the incremental contribution of a photograph being copyrightable. These include for example, improving the contrast or brightness or changing from color to black and white. Most times these changes involve using the GUI interface in the software to choose the proper level based upon visual inspection of the changes occurring in real time to see if they meet the criteria and judgment of the Photographer. This interaction and control is, in the pure sense, the basis of creativity of the Photographer. As with all other incremental contributions, the Photographer should be able to articulate the objective and changes made, such as the brightness was increased because the image was too dark. They should also be able to demonstrate the differences in the image, such as the image is brighter and clearer than if the change was not made.

9. Post Processing Software

Photo processing software can be used to modify and enhance your digital images. Changing the characteristic of the image to improve the vision and objective adds to the artistry and creative element of the photograph. The creative element does not include those changes that do not affect the creativity of the image.

If using film and scanning the photograph to digitize, there are many options on how to save the image such as JPEG and TIFF. There are also choices within JPEG; such as RAW. Digital cameras use algorithms to help clean up and filter the image. The RAW state is unfiltered and will appear not as sharp and a little out-of-focus. The Photographer normally will use post-processing software such as Adobe Photoshop to clean up and filter the raw image. For example, the Photographer has the ability to increase and decrease the brightness to improve the over and under exposure of the raw image.

All cameras are based upon the capture and processing of light. Light can be in different concentrations, strengths, and sometimes colors. Light during a bright sunny day, cloudy, fog, sunrise, sunset, provide examples where light might be different. For digital cameras, the digital sensors cannot process the full range of light under some conditions. In many ways, our eyes are better than the digital sensors as they can normally see and identify these ranges of light. Sometimes these extreme ranges can be better processed in post-processing software. High dynamic range (HDR) occurs when there is a significant difference between bright and dark elements of the image. For example, during a sunset, the sun can appear much brighter over the horizon and can illuminate and display a much greater range of colors. At the same time, there will usually be parts of the subject, such as the foreground that are not reflecting light and therefore dark. This difference can sometimes be difficult for the camera to pick up and can be fixed in some post-processing software. This is done by taking multiple photos, in the range of under-exposed, normal, to over-exposed and merge then in the post-processing app.

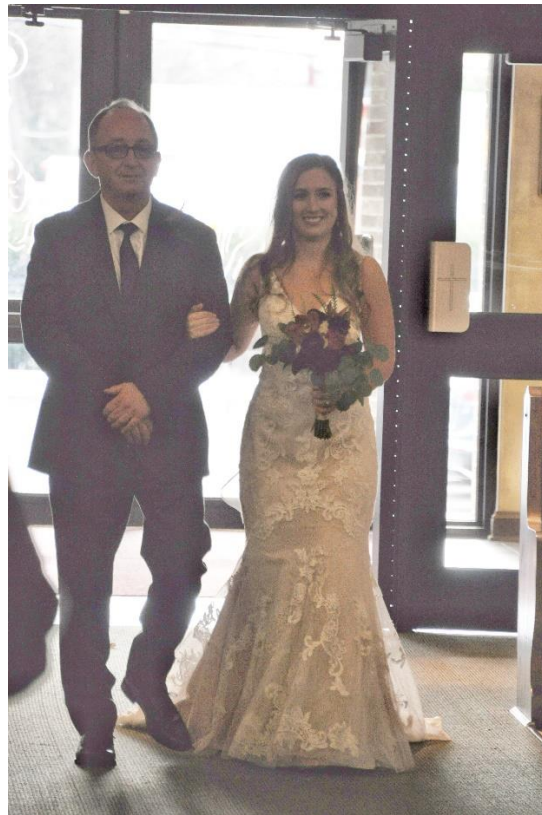
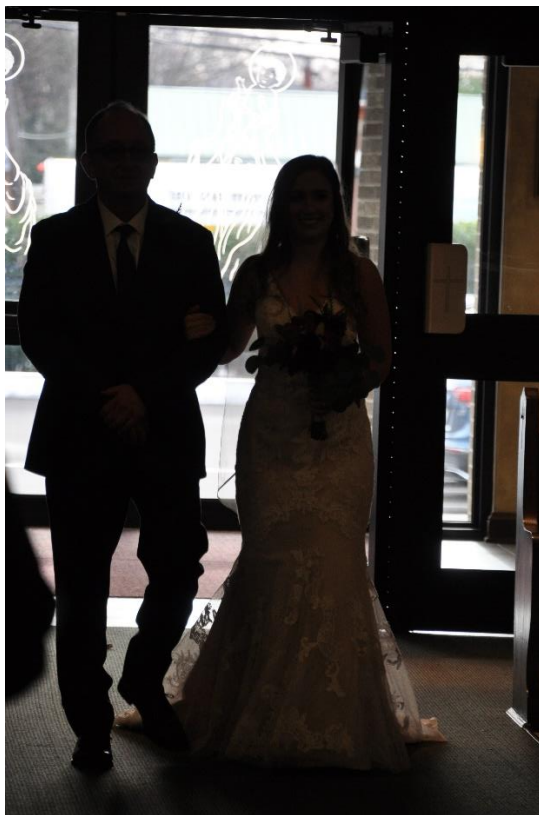
White balance pertains to the digital sensors on digital cameras not being able to discern all white light, especially when the light source can have "color temperature", and the process used to correct it, or more simply making a subject that appears white to your eyes, appear white in a photograph. Color temperature describes the spectrum of light which is radiated from a "blackbody" with that surface temperature. A blackbody is an object that absorbs light, but does not reflect or permit it to pass through.

A Photographer does not deal with blackbodies directly, but some light sources simulate the color temperatures from black bodies. For example, sunrise and sunset will emulate light between 3000 and 4000 Kelvin; daylight with clear skies will be from 5000-5500K; heavily overcast skies will be from 9000-10000K; candle light from 1000-2000K, and a normal household bulb from 2500-3500K. Normal neutral light is seen around 5000K, whereas lower temperatures producing a more of an orange wavelength and the upper temperatures produce more of a blue wavelength. This describes the relative warmth to coolness of white light.

White balance describes the process of correcting light in the upper and lower spectrums, depending upon the source of light. Most digital cameras permit the Photographer to choose the

spectrum of white light such as daylight, cloudy, shady, or flash. Most digital cameras also have the choice of an automatic white balance. The Photographer can also choose to save the photograph as a raw jpeg, then adjust the white balance in the post processing software.

There are literally hundreds of post processing software tools available to manipulate and enhance an image, these include the ability to add or remove subjects; enriching or correcting colors; sharpening or softening contrast; modifying the background; airbrushing skin tone, lipstick, eye shadow, eye color, mascara; reshaping physical attributes such as nose, mouth, eyes, ears, and face; and almost any other type of modifications to the photograph. The User can choose to make changes to a small area of the photograph or the entire image or to elements that match a certain criteria. The software tools are constantly evolving and improving. Sometimes our only limitation can be our imagination.



The photograph above on the left was taken with a Nikon D90 using a 18-300 Autofocus Zoom lens in a church from a distance of about 100 feet. The light from the outside the door made the primary images darkened. Using a downloadable application on the author's phone called Snapseed, the image was edited. The image was opened, 'Tools', 'Tune image', the 'Brightness' were selected. The brightness was increased to show the bride and her father. The image was then saved. Other Snapseed tools included: Details; Curves; White Balance; Crop; Rotate; Perspective; Expand; Selective; Brush; Healing; HDR Scape; Glamour Glow, Tonal Contrast; Drama; Vintage; Grainy Film; Retrolux; Grunge; Black & White; Noir; Portrait; Head Pose; Lens Blur; Vignette; Double Exposure; Text; and Frames. These tools offered many methods and choices to enhance your photographs.



For the cover of the author's book *The Authoritative Reference on Franklin Half Dollars*, the author wanted a photograph of the obverse of the Franklin Half Dollar overlaid on the front of an image of the Franklin Institute. As seen in the left photograph, the author first photographed the front of the Franklin Institute using a Nikon D90 with a 18-200 Autofocus Zoom lens. Through editing software, the images of the people on the front steps were removed and the image made brighter. An ultra-cameo 1962 Franklin Half Dollar was photographed with a Nikon D90 with a 60mm macro lens. The digital image was edited with the elements outside the coin being removed from the image. The obverse of the Franklin Half Dollar was then overlaid onto the front of the Franklin Institute with the images then merged down. The original images of the Franklin Institute and Franklin Half Dollar were copyrightable as well as the combined image of the Franklin Half Dollar overlaid on top of the front of the Franklin Institute being copyrightable. The photograph on the right was the vision and objective of the author. The steps to accomplish this, including the photographic editing, were part of the creative incremental contribution.



The above images show overlays done for the author's book *Off-Center and Multi-Denominational Clashed Dies*. In U.S. Mint history, there are six known instances of working dies that were clashed with working dies of a different denomination. For example, there is an

1857 Flying Eagle cent that shows the clash marks of a Twenty Dollar Gold obverse. There is also an 1857 Flying Eagle cent that shows clash marks of a Liberty Seated Half Dollar obverse. To create a visual representation of the clashing of different denominations, maintaining the proportional sizes, the coins were first photographed, maintaining their relative sizes. Using Adobe Photoshop, the images were first adjusted to their perspective when actually used in the coining press; the larger denomination was inversed. The image of the Flying Eagle cent was overlaid in the center of the larger denomination. A transparency level was then used to keep the primary details of the Flying Eagle cent visible, but to show the design elements of the underlying coin. The original photographs were copyrightable based upon the selection of camera, lens, lighting, and posing of the coin. The overlaid images are copyrightable based upon the copyrights of the original photographs and the incremental contributions in creating the overlaid images.

Author's perspective – If the author takes full coin photographs, which is normally done with a digital camera and macro lens, there is usually background around the coin image. The author uses Photoshop to remove the parts of the photo outside the coin and center the coin to be the primary focus of the image. This is done by using an oval to outline the shape of the coin, select the reverse of the coin, and press delete. The coin image is then selected and copied to a new image with the size of the coin image, so the size of the image is the same as the size of the photograph of the coin. The new image is then modified to the intended size to be used in the book. If the coin does not have the date at the bottom, the photograph is rotated. Most of the full photo coin images were photographed in B&W. Some full photo coin images, especially those required for the cover of a book were photographed in color. Some of these photographs required brightness and contrast adjustments.

The resizing of the images to a consistent size in a book adds to the presentation and standards of the book. This more towards a process and standard, rather than enhancing an image. Therefore, the resizing adds very little in the incremental contribution of the image.

The cropping, centering, rotation, brightness adjustment, and removal of the background outside of the coin enhances the images as they make the coin the primary focus of the image for the Viewer. These enhancements are also performed on each image with choices and judgement based upon how the Photographer desires the image to look. The photographs of these coins are copyrightable based upon the incremental choices of camera, lens, lighting, film, tilting and posing of the coin. The post processing enhancements adds incremental contributions to the digital images.



The photograph on the left of the bottom of the previous page shows the entire photograph taken of the 1870 Indian Cent. The image on the right shows the 1870 Indian Cent after Adobe Photoshop was used to crop, enlarge, rotate, adjust the contrast and brightness, and remove the background outside the image of the coin.

The author has also used post processing software to perform overlays for overdates, over mint marks, clashed dies and such to provide a visual representation replicating the die variety.

Legal perspective – In post processing software of images there is normally almost an infinite number of combinations to enhance the photograph. There are hundreds of tools that are provided to modify an image such as: changing brightness; enriching or correcting colors; changing color to black and white; sharpening or softening contrast; modifying the background; airbrushing parts of the image to make more natural; reshaping physical attributes; fixing the white balance, and almost any other type of enhancements imaginable. For most of these of these tools, the controls normally permit the user to choose the degree of enhancement, changing brightness for example from almost making the image completely white to almost completely dark. The User can also choose to edit a small part of the photo or the entire image. Using the different tools and degrees the tools can be used to modify the image offers an almost endless number of choices that the Photographer can use to enhance the image to meet their vision. A Photographer can choose in the digital camera to record the photograph as a RAW JPEG and use post processing software to choose how they want the image to appear.

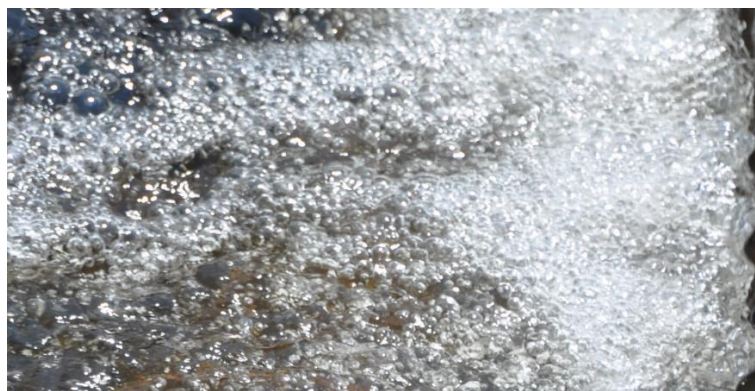
The choices made by the Photographer in post processing software that go towards their vision and objective in the enhancement of the image are part of the incremental contribution of the Photographer to the creative nature and artistic judgment of the image. If the choices are automated, such as setting up a sequence of events to be run when pressing “F1”, and the same button is run for each photo, then the degree of contribution is much less. If the Photographer takes the time to judge each image and the degree chooses the degree of changes based upon their perception of how the changes update the image, then the contribution is much higher.

If a hundred photographs are taken of the exact same bottle under the exact same environmental conditions and produce images that are exactly the same and the objective was to enhance them in the exact same way, then it would make sense to create a process that updated each exactly the same as the first. Would each image be copyrightable? More than likely it would be copyrightable, especially if the Photographer spent time in the enhancement of the first. Even though each enhancement is exactly the same, they are from the same individual. This perhaps might be consider more towards a derivative work on the second through hundredth images as they were an exact duplicate of the first with copying of the choices of the first, which would make them copyrightable based upon derivative works of the first. If the Photographer takes the same hundred exact images of the bottle and enhances each individually through post processing software, it is more likely that the enhancements made will be different, especially if choosing the degree of change for a feature. This will make the resulting hundred images different in some manner with each image being copyrightable based upon the individual changes made. Have you looked at subject then five minutes later looked at it again and seen something different? Perhaps your thought process, imagination, or what caught your attention changed slightly. This can change your perspective and affect your choices in how you enhance the image. That is part of what makes us human as compared to pure logic of a software program.

Some features of post processing software will not enrich or enhance the expression of the image, such as resizing the image or changing the image type or medium such as from TIFF to JPEG, or changing the DPI. These features might help the Photographer overcome problems encountered when including an image in certain applications or printing an image, but these are most towards processing issues rather than enhancements to the image to help the creative or artistic nature of the image. It would be difficult in most cases to demonstrate and show the differences to the image based upon the changes made. Therefore, these modifications are not normally towards the incremental contribution of an image being copyrightable. There are still of course ways to enhance an image using these tools to change the appearance and characteristics of the image. For example, using an image of a coin, resize the image to stretch the sides outward resulting in the coin having an elongated shape rather than a round shape. The Photographer's choice to stretching the image goes toward changing its appearance and would be considered a creative enhancement by the Photographer.



The above two photographs are of a camera and bellows tube. The photograph on the left is the original. The photograph on the right was cropped to only show the centralized subject of the photograph. There is an incremental contribution as the cropping was done to centralize the image, remove unwanted shadows and distractions in the background such as the fold in the sheet, which enhances the user's focus and perspective. This contribution is very minimal as there was no creative enhancement to the image. If cropping was the only contribution in the creative aspect of the second image, then it would more likely not be enough to add additional elements of copyright protection to the second image.



The photograph on the bottom of the previous page on the left shows a small section of stream and was taken with a Nikon D90 using a Nikon Nikkor 18-300 autofocus zoom lens. The photograph on the right was cropped from the photo on the left. The two photographs appear different, the one on the left appears like rocks and a shallow stream. The photograph on the right appears like thousand of bubbles connected together. Even though the photograph on the right is a derivative of the photo on the left, on their own, they appear to the viewer entirely independent and unlike. This strengthens the argument that the cropping can result in creative incremental contributions that make an image copyrightable.

What if someone makes a digital copy of someone else's copyrighted photograph then enhances the images in post processing software, can they own the copyrights to the enhancement made by them in the digital image? Changing medium from a photograph to a digital image has no relevance. The copyright of the original work and the creativity used therein to create the work would be owned by the person who created it. If someone else uses a copyrighted work as the basis of their work, this would possibly a copyright infringement, no matter what enhancements were made. If the original work was not copyrightable or the copyrights of the original work expired, then in order to make the new work copyrightable, there must be originality and substantial variation made to the image, see *ATC Distrib. Grp.* the Court stated:

A reproduction of a work of art or photograph in a different medium is copyrightable in principle, if it involves "great skill and originality," Alva Studios, Inc. v. Winninger, 177 F.Supp. 265, 267 (S.D.N.Y.1959), or "substantial variation, not merely a trivial variation such as might occur in the translation to a different medium," L. Batlin & Son v. Snyder, 536 F.2d 486, 492 (2d Cir.1976).

In *ANDREW PAUL LEONARD, d/b/a APL Microscopic vs. STEMTECH INTERNATIONAL INC*; Nos. 15-3198& 15-3247; August 24, 2016, the United States Court of Appeals for the Third Circuit stated: Leonard obtains cell samples from doctors, scientists, and researchers and pays a scientific research institution to use an electron microscope to photograph the cells. The images first appear in black and white, and Leonard uses his "artistic judgment" to enhance the photos in color. Leonard did not photograph the cells. His artistic contribution was using post-processing software to add colors to the images. This single incremental contribution was enough to qualify for copyright protection.

As with all other incremental contributions, the author should be able to articulate the objective of the changes and demonstrate how the changes affected the image.

Besides what is listed in this book, there are many other means to enhance your photographs through creative judgement and choices. One of the greatest masters of photography was Ansel Adams; his books are pure works of art. Adams was a wizard, especially with how he processed negatives. His book, The Negative provides examples of how he controlled the ingredients, mixture, timing, and other factors in his negative process in order to produce incredible and stunning works of art in his photographs. If you want to learn to become a better photographer through new ideas and creative ways to photograph, Adams books opens many doors in exploring.

Analysis of different scenarios for coin photography

The Photographer should be able to articulate the objective and vision in their choices which affect their artistic judgment, and they should be able to demonstrate the creative differences created in the photographs. Of course, the originality may be depiction and rendition of the subject in the photograph.

1. Using an advanced scanner that can create high resolution detailed images. Place a coin on the scanner and scan it. This image is not copyrightable. It is the same concept of scanning a painting, where the objective is to create an exact duplicate in a different medium. There are no choices that form the basis of creativity or artistic judgment of the image.

Of course, it is possible to post-process the image through software tools such as Photoshop to add an element of creativity to the image of the coin, so long as the modifications involve originality and significant variation to the image. Only those elements of creativity that were added would be copyrightable. If someone copied the modified image, removed the creative elements added, leaving the basic coin image, it is possible that they could add their own creative elements in post processing software and make an image that is copyrightable.

2. Using a point and shoot digital camera that has no focus capability and no additional lighting. Place a coin on a flat surface. Take a full photograph of the coin by raising or lowering the camera above the coin to get the entire coin in the frame. This would be questionable and more than likely not be copyrightable. As the Photographer had to make choices in order to frame the coin to create the proper perspective, there is a very minimal contribution. This would more than likely not be copyrightable as the primary objective of the photograph is to capture the basic image of the coin exactly.

If the Photographer tilted the coin to change the posing and reflection of light to the camera; added a light source to change the appearance and luster of the surface; creative post processing of the image; adding an artistic background underneath the coin that is included as part of the photograph; each of these are examples, which would add incremental contributions, which would more than likely qualify the image for copyright protection.

3. If an 1864 Two cent coin was on a white piece of paper and no creative contributions were made in taking the photograph, then it would not be copyrightable.

If the same 1864 Two cent coin was placed on an image containing the American Civil War (that was not copyright protected), when the coin was struck, then the depiction of the coin with a background of the Civil War would be more than likely copyrightable. If the Two cent coin was photographed with a camera, lens, and lighting that were chosen to meet the objective of the Photographer or if the Photographer focused the coin while adjusting the lighting, position, or anything else in order to accomplish their goals, then these contributions would most likely qualify the image for copyright protection.

4. Using a special housing built specifically to photograph coins. The housing contains all white surfaces to reflect lighting evenly. Halogen light sources are built into the top of

the housing. The door in the front of the housing is opened and the coin placed in the center on a stand. At the top of the housing is a hole to place the camera lens through. A cell phone or point and shoot digital camera is placed on top of the hole and the coin photographed. The image would most likely meet the minimum requirements for a photograph being copyrightable. The primary contribution is the control of lighting, both the surface of the housing and the halogen lighting add significantly to appearance of the surface of the coin. The differences would be visible by photographing the coin outside the housing and then within and comparing side by side.

5. Using computer interfaced with a camera to control and photograph coins. Photographing coins through an automated process, which feeds the coins under a camera, the computer interfaced with the cameras proper lighting and focus are used when taking the picture. The images of the coins would more likely not be copyrightable. The computer uses algorithms, logic, rules, and a controlled environment to create the photographs. The images are not based upon creativity, original expression, and artistic judgment.
It is possible to post-process the image through software tools such as Photoshop to add an element of creativity, so long as the modifications involve significant variation and originality to the image.
6. Creating a setup that uses a digital camera, auto-focus macro lens, controlled lighting to photograph all coins. For example, using a Nikon D90 camera mounted on a stand at the optical distance for the proper focal length, Nikon Nikkor 105mm macro lens, non-glare halogen light sources that are placed on the sides, and a black background where the coins are placed to cut down glare. A depressor is also attached to the shutter button to cut down possible vibration and movement to the camera. A secondary screen is attached to the camera to offer a clear view of the coin being photographed without looking through the viewfinder. The coin is placed on a dot directly under the lens, the Photographer views the coin on the external screen, presses the depressor halfway to cause the camera to auto focus, and when focused, depress fully to capture the image. The objective is to capture the full image of the coin in high resolution, but also to capture the image with a lustrous surface. This image would be most likely copyrightable. Each of the choices of equipment and accessories add to the objective and vision of the Photographer. Some elements have a minimal impact to the photograph, while others, such as the halogen light source and 105mm macro lens add significant impact to the resulting image. The primary and greatest choice by the Photographer is that for each coin, the Photographer views the coin and chooses whether the coin is in focus when the photograph is taken.

LITIGATION

The author is not an attorney, this section is presented to give a few of the important the important issues to consider regarding copyright litigation. Remember, it is always better to attempt to resolve an issue first through direct communication. Do what is reasonable first, if that does not work, do what is necessary. If you need to go to court, a judge will want to see that all of the parties attempted to resolve the issues themselves, this is especially true in Federal Courts. The Courts can look down upon those who did not attempt to be reasonable in resolving the issues, especially if you lose. Litigation can normally be a long and tedious process, you need to have the willpower to see it through, an open mind to listen to and consider all reasonable options, the ability to remove emotions from decisions, and the time to spend possibly hundreds of hours researching all law and case law applicable and writing your Complaint and all briefs and motions if you are representing yourself pro se. You need to weigh all options before filing, determine the amount of cost, what the possible range of outcomes in a judgment, determine the best and worst case scenarios, have all case law and statutes thoroughly researched. Remember it is always possible that you can lose and be held responsible for the opposing party's cost and attorney's fees. There is also the possibility for the unseen and unexpected, which you need to adapt to and overcome. Going to court should be an absolute last option, whereas you have no other choice to seek justice and resolution.

On the other side of the coin so to speak, if someone infringes on your copyrights, they might attempt to play bean counter. This analogy was sometimes used by car manufactures when products were poorly designed and caused problems. The company had a choice to either fix the problem through a recall or choose not to fix the problem and face possible lawsuits. The bean counter would analyze the cost of fixing the issue versus the potential loss through lawsuits. Using this analogy in a copyright infringement scenario, a company or individual can choose to fix the issue or choose to do nothing. A company might believe and take a chance that the copyright owner will do nothing, especially considering the time, effort, and expense of a lawsuit, therefore they do nothing themselves. This attitude is not just limited to copyright infringement, the author has seen the same philosophy used by some car insurance companies and in other industries. At that point, you need to determine what level you are willing to take the issue to have it adjudicated.

What if you decide to litigate and after going all the way through a jury trial, they jury finds that the defendants infringed on your copyrights, but awards you damages of only one dollar as they believe your damages were minimal; if you had to do it again, would you? From the author's perspective, the answer is simple, absolutely yes; the author would go through it again. This is primarily based upon the fundamental principle of right versus wrong, especially if it was intentional, and more so if the party was deceitful. This might be considered more of a moral reason rather than a monetary objective; we must choose what our goals are. The author would do everything in his power to first do what was reasonable, but if necessary, do what was needed. One note of justice in this scenario, if a party is found guilty of copyright infringement, if they do the same type of infringement again, they could be liable for treble damages. On a side note, the main reason the author could and would have this resolve is because the author is extremely focused, loves to research, has the willpower to persevere, has the time if needed as his kids are grown, and believes in justice and making right for that he was wronged. If you are considering

litigation, you need to evaluate your personal situation, you should not start a litigation unless you are willing to go to its completion.

If an issue cannot be resolved, and a copyright infringement lawsuit is being contemplated, then a good starting point might be to write an outline of your Complaint. If you have an attorney representing you, they will write the complaint, but it's a good idea to assemble the information that they need. There are many examples of Copyright Infringement complaints that can be found on the internet; the majority of these pertain to music, which still follow the format and structure that can be used for photographs.

Writing a Complaint or collecting all the information for the Complaint can help you determine if the facts asserted meet the criteria for the copyright infringement statutes. This basic information should include:

1. Organize the timeline, sequence of events, any communications, and infringing acts.
2. You also need to make sure your works were properly and timely copyrighted with the Copyright Office; if they were not registered within the specific timeline, you will not be able to seek statutory damages for the infringement. In addition, a copyright lawsuit cannot be filed until the works have been submitted to the Copyright Office. Keep in mind also that the statute of limitations for a copyright infringement lawsuit is three years. You should have your copyright registration from the Copyright Office; if you do not have available, it can be obtained through the Copyright Office's web page. Especially for photographs, it is also a good idea to include in your Complaint those incremental contributions that make your work copyrightable. It is always better to be prepared in case this aspect of your copyrights is challenged.
3. The parties need to be established. Gather a list of each party to the litigation. For individuals, this you need to include their name, mailing address and contact information. For corporations and limited liability companies, you need to include the name and address for their Registered Agent. It is a good idea to also include the names of the primary officers of the company along with their contact information. Normally a company has a primary state that they incorporated in. In that state's web page for the Secretary of State, for some states under the Business Entity Records, the Company will be listed with Entity ID, Registered Agent, and other information. A company can also be listed as Foreign LLC in a different state that they do business with. State for each party the reasoning on why they are included in the lawsuit. If the parties are in different states, you need to show why a Court should have out-of-state personal jurisdiction over a party, especially if they are a corporation. For example, the party does business in the state where the litigation is being filed.

One of the primary goals in the process of preparing for litigation must be to fully understand the statutes, laws, and guiding caselaw and then apply them to the facts of your case. The main objective of this section is to present some of the more important legal aspects pertaining to copyrights to provide an idea of what you need to understand. Reading as much case law as possible will provide different scenarios and examples considered and adjudicated by the Courts. In their decision, the Courts will normally outline the facts, then provide an analysis of all the issues being litigated. Normally referenced will be other cases that have dealt with and adjudicated the same subject matter and that have become the precedence. This offers an

opportunity to view other cases covering the same topic. The Court's analysis and conclusions are usually written in a logical and easy to follow fashion. An important aspect of these legal decisions are the criteria and requirements established for the laws they cover. For example, in *Art Rogers v. Jenn Koon*, Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540, 1992. The United States Court of Appeals, Second Circuit stated: "*To establish an infringement of a copyright, a plaintiff must show both ownership of a copyright and that defendant copied the protected material without authorization.*" These requirements can be used to determine if the facts in your case meet the established standards. When evaluating these Court decisions, it can also help you understand the actual and statutory damages that have been awarded so that you can comprehend the facts and logic that these awards were based upon. It is possible that since the writing of this book that new case law has established which covers a scenario not previously covered or interprets laws in a different manner.

Federal Courts handle all disputes regarding copyright infringement. If all parties are in the same state, then the choice of Federal District Court is simple. If some of the parties are from different states can make choosing the proper venue more challenging. Most Federal District Courts have a web page that include basic instructions for filing a Complaint with a sample outline. They also include some of the mandatory forms required. These courts can be unforgiving to those who do not understand or have knowledge of the laws, case law, and procedures. You need to prepare for all aspects and challenges to your Complaint.

It is highly recommended that you consult or retain an attorney if you need to file a copyright infringement lawsuit. An intellectual property attorney will understand all aspects of litigation; some will take the lawsuit on contingency if they believe it has a high probability of success and will be financially beneficial. Providing a potential attorney with the information for your Complaint is also a good way to get feedback on the validity and strength of your case and get a feel of the knowledge and skill of the attorney. Choosing an attorney in the district you are litigating the infringement will have the benefit of the attorney more than likely knowing the judges and how they operate. An individual may have the knowledge and ability to research all the case law and statutes and write the Complaint and all motions. The basis of all law is what reasonable people believe and most case law is normally written in a manner that a logical person can understand. A whole different ballgame is presenting everything to a judge or jury during a trial.

One of the greatest challenges we sometimes face throughout life is adapting our communication skills so that others understand what we are attempting to convey. As most of us have different backgrounds, education, and experiences, the way we express ourselves may be different, which can sometimes make it difficult for the recipient to comprehend. It also takes practice to learn the skill of public speaking. The author's daughter recently got married and the father of the bride and groom each gave a speech. The groom's father was a marketing person who was well versed in speaking to large groups, his words flowed like silk. The author read from a paper, the words kept getting smaller as anxiety and blood pressure rose. There is an old saying, a man represents himself as a fool for a client; this is especially true during a trial. Arrogance can be a fatal flaw in believing that everyone can easily follow your presentation. In addition, as we have a personal connection to your case, you might come across as revengeful compared to someone seeking justice. Attorneys are trained to present their thoughts in an organized, methodical

manner, but also they have the experience to adapt their manner based upon the judge's or jury's reaction and feedback. It is one thing to argue a motion before a judge or even argue before an appeal court as this can be more of a legal argument based upon case law.

Before filing a Complaint, it is always a good idea to send a demand letter to the parties. Most States require this as a prerequisite before filing a lawsuit. For example, Massachusetts General Laws Chapter 93A, Section 9, *Civil actions and remedies, class action, demand for relief, damages, costs, exhausting administrative remedies*. It is more probable that the Defendants will take your request more serious if you send your demand letter through an attorney.

You should expect, especially if suing a company, that they will hire an experienced intellectual property attorney. This might feel intimidating, but sometimes it is preferred. The author would rather have someone who understands the law than someone who you must explain the law to. If your case is strong and your arguments are supported by legal precedence, and if your first objective is to attempt to negotiate a reasonable solution, then it is better to do this with an knowledgeable attorney who will be able to recognize the strength of your case and desire to settle if possible. If you are not prepared or your case has flaws, a good attorney will quickly seek to dismiss or challenge parts or all your claims. You need to be prepared for anything and quickly adapt to any situation.

Sometimes you might have people who accidentally or unknowingly used your photographs. This can often be resolved by a simple email. Several times individuals have copied photographs from the author's books and used them on places such as Ebay to help describe their coins. The author simply wrote and requested them to remove the photographs, which they did. The author has loaned his photographs to others for books, articles, and such, normally with the simple request that when the photographs were used, they included a note somewhere around the photographs stating: "photographs courtesy of Kevin Flynn", or something to that effect. This permits the author to protect his works and advises others the source of the photographs.

In the example below, Fred White, the publisher of XYZ123 is included in the litigation as an individual. Under most circumstances, a member of a limited liability company (LLC), cannot be personally named in a litigation against the business entity, but there are exceptions. For example, there are two primary reasons a corporate veil can be pierced: 1. Alter-ego doctrine, whereas the corporation is found to be simply the alter-ego of an individual. 2. A member commits a fraudulent or wrongful act, such as copyright infringement.

In *Aker Solutions, Inc., v. Shamrock Energy Solutions, LLC v. Samurai International Petroleum, LLC*, Civil Action No. 16-2560, October 8, 2019, the United States District Court, E.D. Louisiana found that a corporate officer can be held personally liable when the corporation is simply the alter ego of the individual. The Court stated:

Generally, in Louisiana "corporations are distinct legal entities, separate from the individuals who comprise them, and ... the shareholders are not liable for the debts of the corporation." Riggins v. Dixie Shoring Co., 590 So.2d 1164, 1167 (La. 1991) (citations omitted). However, a "court may ignore the corporate fiction and hold the individual shareholders liable ... where the corporation is found to be simply the 'alter ego' of the shareholder," which "usually involves situations where fraud or deceit has been

practiced by the shareholder acting through the corporation." Id. at 1168 (citations omitted).

*Louisiana courts have determined that the same veil-piercing requirements regarding corporations also apply to limited liability companies. ORX Res., Inc. v. MBW Expl., L.L.C., 32 So.3d 931, 935 (La. App. 2010) (court can pierce corporate veil of LLC under alter ego doctrine); Prasad v. Bullard, 51 So.3d 35, 40 (La. App. 2010) (court can pierce corporate veil to reach the alter ego of company member and hold company member liable for debts of LLC). Under Louisiana law, the veil of protection afforded by the limited liability company form may be pierced if in fact the limited liability company was operating as the alter ego of its members or if its members were committing fraud or deceit on third parties. Hollowell v. Orleans Reg'l Hosp., 1998 WL 283298, at *10 (E.D. La. May 29, 1998), aff'd, 217 F.3d 379 (5th Cir. 2000).*

In *Broadcast Music, Inc., v. Behulak*, 651 F.Supp. 57 (M.D. Fla. 1986), the Court found that a corporate officer could be held personally liable for copyright infringement, the Court stated:

A corporate officer's liability for copyright infringement depends upon his financial interest in the corporation and the extent of his right and ability to supervise infringing activity. "An individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement." (Cites omitted) Southern Bell Telephone and Telegraph v. Associated Telephone Directory Publishers, 756 F.2d 801, 811 (11th Cir. 1985). In Southern Bell, the court found that an individual who had a financial interest and the right to supervise the infringing activity was liable for the infringement. Southern Bell, 756 F.2d at 811.

In Warner Brothers v. Lobster Pot, Inc., 582 F.Supp. 478 (N.D. Ohio 1984), the court applied a two part test to determine whether defendant Haffney, a corporate officer of defendant Lobster Pot Restaurant, was individually liable for the restaurant's copyrighting infringement activity. The court announced the test, which is extracted from the cited legislative history: (1) whether the officer has direct financial interest in the activity, and (2) whether the officer has actual right and ability to supervise the infringing activity. The court found that Haffney satisfied the two prong test.

Example, Complaint, Section 1, "PRELIMINARY STATEMENT" – High level summation of facts and infringement. These are fictional facts to present the outline.

1. Plaintiff brings this action seeking to put an immediate stop to, and to obtain redress for, Defendants' blatant and purposeful infringement of the copyright of the Plaintiff's photographs and Defendant's distribution of Plaintiff's photographs with Plaintiff's Copyright Management Information ("CMI") removed.
2. In 2005, Plaintiff loaned XYZ123's publisher, Fred White ("White") Plaintiff's photographs on the condition that as Plaintiff's name was included with Plaintiff's photographs stating that Plaintiff was the owner of the photographs, to be used in their book *Expert Guide to Widgets*, which was published by XYZ123. The *Expert Guide to Widgets, First Edition*

(“First Edition”) included twenty-four of Plaintiff’s photographs and included Plaintiff’s name (CMI) around Plaintiff’s photographs identifying Plaintiff as the owner of the photographs “*Photos courtesy of Kevin Flynn*”. In 2010, XYZ123 published *Expert Guide to Widgets, Second Edition* (“Second Edition”). Twenty-four of Plaintiff’s photographs (“Photographs”) were used in the Second Edition. Plaintiff’s name as the owner of Plaintiff’s Photographs (CMI) was removed from the Second Edition. Plaintiff contacted White. Plaintiff and White met at the Book show in Cherry Hill New Jersey in March 2010. During this meeting, White stated to Plaintiff that White had ordered the removal of names from around the photographs in the Second Edition, which photographs were provided by any individuals as White considered the names around the photographs as a form of free advertisement. Plaintiff stated to White, that for any future edition of *Expert Guide to Widgets*, Plaintiff’s Photographs either be removed, or that Plaintiff’s name (CMI) be included with the Photographs as the owner of the Photographs. White stated to Plaintiff that the Photographs would be removed from future editions of *Expert Guide to Widgets*. In response, Plaintiff stated to White that there was no permission to use the Photographs in future editions of *Expert Guide to Widgets*. In June 2015, the next edition of *Expert Guide to Widgets*’s was announced. Plaintiff contacted White to verify that Plaintiff’s Photographs were removed or Plaintiff’s name (CMI) was included with the Photographs. White responded, confirming Plaintiff’s inquiry. When *Expert Guide to Widgets, Third Edition* (“Third Edition”) was printed, Plaintiff discovered that Plaintiff’s Photographs were included in the Third Edition without Plaintiff’s consent or knowledge, and without Plaintiff Copyright Management Information (CMI) included with Plaintiff’s Photographs.

3. Plaintiff’s Photographs were included in the Third Edition without Plaintiff’s permission and in violation to Plaintiff’s copyrights. Defendants published and distributed Plaintiff’s Photographs in the Third Edition knowing that Plaintiff’s CMI information had been removed without authority of the Plaintiff. Defendants financially benefitted through having Plaintiff’s Photographs in the Third Edition.

Example, Complaint, Section 2, “THE PARTIES” – lists the plaintiff and all defendants (the defendants are all made up name and contact information).

4. Plaintiff Kevin Flynn (“Flynn” or “Plaintiff”) is a widget book author and a legal owner to the copyrighted Photographs, see Exhibit C, for copies of the Plaintiff’s Photographs. Many of the widgets used for the Photographs are owned by Plaintiff. Plaintiff used his own

camera, microscope, film, lighting, and other equipment to independently create the Photographs. Plaintiff has written approximately 5 books on widgets. Many of the Photographs were used in Plaintiff's books in the 1990s. Plaintiff is located at 11111 Fictional Road, Westampton, NJ 08060. Plaintiff's phone number is 609-111-1111. Plaintiff's email address is fictional1111@yahoo.com.

5. Defendant XYZ123 Publishing Company LLC ("XYZ123") is a Limited Liability Company organized and existing under the laws under the State of New York (Entity ID - 111-000). XYZ123 is engaged in the business of, among other things, publishing books. XYZ123 published the First Edition in 2005, Second Edition in 2010 and Third Edition in 2015. XYZ123's current address is 1111 Fictional Drive, Albany, NY 12201. Joseph First ("First"), a resident of the State of New York, is listed as the Managing Member of XYZ123 Publishing with a contact number of 800-111-1111. Mike Middle ("Middle") is the President of XYZ123 Publishing with an email at mike.middle@xyz123.com and phone number of 800-111-1112, his LinkedIn site states that he lives in the "Albany NY area", upon information and belief, Middle work address is at Fictional Drive, Albany, NY 12201. In the New York Secretary of State, Business Entity Records, XYZ123 Publishing is listed as a Domestic LLC, the Registered Agent Name is Albert Last ("Last"), and the Registered Agent Address is 1111 Fictional Drive, Albany, NY 12201. Last's email address is timlast@xyz123.com, phone number 800-111-1113. XYZ123's website is www.xyz123.com.
6. Defendant Fred White is the Publisher for XYZ123. White ordered the Plaintiff's Copyright Management Information ("CMI") removed from Plaintiff's photos for the Second Edition. White told Plaintiff in 2010 that Plaintiff's Photographs would be removed from the next edition of the *Expert Guide to Widgets*'. White had knowledge that Plaintiff's CMI information was removed without authority from the Plaintiff. White confirmed in 2015 that Plaintiff's Photographs were removed from the Third Edition or that the Photographs included the CMI information, when they were not. Upon information and belief, White's primary residence is 2222 Fictional Circle, Albany NY 12201. White's email is fredwhite@xyz123.com, his phone number is believed to be (800) 111-1114. White's LinkedIn site states that he lives in the "Albany NY area". Upon information and belief, White's work address is at 1111 Fictional Drive, Albany, NY 12201.

JURISDICTION AND VENUE

Jurisdiction - Federal Courts have jurisdiction over all disputes regarding copyright infringement. A civil action seeking damages and injunctive relief for copyright infringement under the Copyright Laws of the United States (17 U.S.C. § 101 et seq.) creates a federal question of law. Federal courts have subject matter jurisdiction over civil actions that pertain to the United States laws (28 U.S.C. § 1331). Federal courts have original jurisdiction over civil actions arising any Act of Congress relating to copyrights (28 U.S.C. § 1338(a)).

Another option of a Federal Court gaining jurisdiction over litigants of different states is the Diversity of Citizenship statute (28 U.S.C. § 1332). With this statute, there can be greater consequences if you lose or if you do not meet the minimum damages awarded, especially if there is an initial offer by the defendants. For copyright infringement, you simply need 28 U.S.C. § 1331 and 1338(a).

There are several types of jurisdiction, for example: Original jurisdiction is a Court's power to hear and adjudicate a matter (such as in 28 U.S.C. § 1338) ; Subject matter jurisdiction is a Court's power over the nature of the case and type of relief sought, (such as in 28 U.S.C. § 1331); Personal jurisdiction is a Court's power to bring a party into its adjudicatory authority.

In *Excelstor Technology Inc. v. Papst Licensing GMBH CO KG*, No. 2008-1140, September 16, 2008, the United States Court of Appeals, Federal Circuit stated that subject matter jurisdiction extends to a case in which a well-pleaded complaint establishes a right to relief under United States laws.

In Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988), the United States Supreme Court set forth a two-part test for determining whether federal courts have exclusive jurisdiction over a case pursuant to 28 U.S.C. § 1338(a). The Court held that § 1338 jurisdiction extends to any case “in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.” *Christianson*, 486 U.S. at 809, 108 S.Ct. 2166. In analyzing whether patent law is a necessary element of *ExcelStor's* claims, we are limited to an analysis of *ExcelStor's* well-pleaded complaint. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Under the well-pleaded complaint rule, “arising under” jurisdiction “must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.” *Christianson*, 486 U.S. at 809, 108 S.Ct. 2166 (citations omitted). A claim does not arise under the patent laws if a patent issue appears only in a defense to that claim. *Thompson v. Microsoft Corp.*, 471 F.3d 1288, 1292 (Fed.Cir.2006) (quoting *Christianson*, 486 U.S. at 809, 108 S.Ct. 2166).

Venue - Defines where the civil action is brought in Federal district court. If all parties reside or work in the same state, then the choice of the Federal District Court is simple. If the parties reside in different states, then the choice of venue becomes more complex, especially if a party is

a company or LLC. Personal jurisdiction is the power of a Court to bring a party within the Court's authority.

Venue general is covered under 28 U.S.C. § 1391. This statute goes through many of the scenarios and options available on where the Complaint can be filed and adjudicated. For example under section (b), filing the lawsuit in a Federal district court based upon: Where any of the defendants reside; where a substantial part of the events giving rising to the claim occurred; or where any defendant is subject to the court's personal jurisdiction. Section (d) pertains to Corporations, which states in part that a corporation will be subject to the personal jurisdiction of the district court where there are significant contacts. Under 28 U.S.C. 1400 section (a), which pertains in part to copyrights, venue is appropriate in the judicial district where the defendant or his agent resides or may be found. Under section (b), which pertains to patent infringement, venue is appropriate where the defendants reside or where the acts of infringement or has an established place of business.

In *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas et al. Certiorari*. No. 12-929, December 2013, the United States Supreme Court stated regarding venue that venue is proper if the case falls within one of the three categories of 28 U.S.C. § 1391(b), the Court stated:

This question—whether venue is “wrong” or “improper”—is Cite as: 571 U. S. ____ (2013) 5 Opinion of the Court generally governed by 28 U. S. C. §1391 (2006 ed., Supp. V).² That provision states that “[e]xcept as otherwise provided by law . . . this section shall govern the venue of all civil actions brought in district courts of the United States.” §1391(a)(1) (emphasis added). It further provides that “[a] civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.” §1391(b).³ When venue is challenged, the court must determine whether the case falls within one of the three categories set out in §1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under §1406(a). Whether the parties entered into a contract containing a forum selection clause has no bearing on whether a case falls into one of the categories of cases listed in §1391(b). As a result, a case filed in a district that falls within §1391 may not be dismissed under §1406(a) or Rule 12(b)(3).

In *Pure Oil Co. v. Suarez*, No. 692, 1966, the United States Supreme Court found that a corporation can be sued in the district where it does business, the Court stated:

Provision fixing venue of actions under Jones Act in district where the defendant employer resides (i.e., in case of corporation, is incorporated) or his principal office is located held expanded by the later general venue statute, 28 U.S.C. 1391 (c), so that a corporation, in the absence of contrary statutory restrictions, may also be sued in district where it does business. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 , distinguished. Pp. 202-207.

In *Nick GIANNARIS, et al. v. Anthony C.Y. CHENG, Sr., et al.* No. CIV.A. WMN-02-104., the United States District Court, D. Maryland found that the Court had personal jurisdiction over the non-resident Defendant, when the Defendant transacts business or performs any character of work in the State, the Defendant has minimum contacts in the State, or that the contact may be sufficient to create jurisdiction when the cause of action arises out of that single contact.

A federal court "has personal jurisdiction over a non-resident defendant if (1) an applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process." *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199 (4th Cir.1993). Maryland's long arm statute states that Maryland courts have personal jurisdiction over any defendant "who directly or by an agent . . . transacts any business or performs any character of work or service in the State." Md.Code Ann. Cts. & Jud. Proc. § 6-103(b) (1). It has long been recognized that this provision of the statute provides jurisdiction to the full extent permitted by due process. *Id.*; *McGann v. Wilson*, 117 Md.App. 595, 701 A.2d 873 (1997).

For this Court to exercise personal jurisdiction over a defendant, due process requires that the defendant have at least "minimum contacts" with Maryland "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Physical presence within the forum state is not required to establish personal jurisdiction over a non-resident defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Jurisdiction is also established if it can be shown that the defendant has purposefully directed its activities towards the residents of the forum state, *id.* at 472, 105 S. Ct. 2174, or otherwise "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

A court may exercise "specific jurisdiction" where the suit arises from a defendant's contacts with the forum state. Helicopteros Nacionales de Colombia v. Hall, 466 U.S.408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Specific jurisdiction exists when the "contacts related to the cause of action . . . create a 'substantial connection' with the forum state. . . ." *ESAB Group v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir.1997), cert. denied, 523 U.S. 1048, 118 S. Ct. 1364, 140 L. Ed. 2d 513 (1998) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)). The defendant's activities must be purposefully directed at the forum state "in more than a random, fortuitous, or attenuated way." *ESAB Group*, 126 F.3d at 625 (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. 2174 (1985)). The Supreme Court has held that even a single contact may be sufficient to create jurisdiction when the cause of action arises out of that single contact, provided that the principle of "fair play and substantial justice" is observed. *Burger King*, 471 U.S. at 477-78, 105 S. Ct. 2174.

Example, Complaint, Section 3, "JURISDICTION AND VENUE"

7. This action arises under the copyright law of the United States of America, 17 U.S.C. § 101 (et, seq.).

8. This Court has subject matter jurisdiction as this is a civil action seeking damages and injunctive relief for copyright infringement under the Copyright Act of the United States, 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1338(a) (jurisdiction over copyright action).
9. This Court has personal jurisdiction over Defendants as Defendants do systematic and continuous business in New Jersey and in this judicial district. Defendant XYZ123 sells books and magazines online to residents of New Jersey (www.xyz123s.com). Third Edition, the infringing work, is being sold by XYZ123 in New Jersey. It is believed that XYZ123 has sold over 50 different titles in the State of New Jersey. XYZ123 has also sold other products while in the State of New Jersey. XYZ123 attends a book show in the state of New Jersey, where they sell their products. White, XYZ123's publisher, attends the book shows in New Jersey. Venue is also appropriate in this judicial district per U.S.C. § 1391(b)(2), as a substantial part of the events giving rise to the claims herein occurred when Plaintiff met White at the book show in New Jersey and discussed this issue. Venue is also appropriate in this judicial district per 28 U.S.C. § 1400(a), as Defendants and/or their agents can be found in the state of New Jersey.

COPYRIGHT LAWS AND INFRINGEMENT

The Constitution establishes Congress's power to create copyrights to “*promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*”

The Copyright laws for the United States are contained within chapters 1 through 8 and 10 through 12 of Title 17 of the United States Code. Several of these sections are presented in Appendix A. Some of the more important sections include the following statutes related to the ownership of photographs: Under section 17 U.S.C. § 102, copyright protection in original works of authorship, includes pictorial, graphic, and sculptural works. Under section 106, the Copyright owner has the exclusive right to reproduce, prepare derivative works, distribute, and transfer ownership of the work. Under section 17 U.S.C. § 201, ownership of copyright, in a work for hire, the employer is considered the copyright owner unless the parties have expressly agreed otherwise. The owner may transfer the copyrights of a work in whole or part.

Copyright registration - Before a civil action can be filed for copyright infringement in Federal Court, the works must first be filed with the Copyright Office. If the works are not registered with the Copyright Office, your litigation can be dismissed from Federal Court. In your Complaint, it is a good idea to include your Registration number and Certificate of Registration that is returned by the Copyright Office. In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. See sections 17 U.S.C. § 410 and 411 that are copied in Appendix A.

In *Art Rogers v. Jenn Koon*, Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540, 1992. The United States Court of Appeals, Second Circuit stated that the certification of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright, they stated:

*To establish an infringement of a copyright, a plaintiff must show both ownership of a copyright and that defendant copied the protected material without authorization. See Weissmann v. Freeman, 868 F.2d 1313, 1320 (2d Cir.), cert. denied, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989). **The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright, see 17 U.S.C. § 410(c), though that presumption of ownership may be rebutted, see Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir.1985). Protection under the copyright statute extends to pictorial works, 17 U.S.C. § 102(a)(5). For more than a century photographs have been held to be copyrightable "writings" under Article I, § 8 of the Constitution. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884) (photograph of Oscar Wilde an original work of art).***

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated that a Plaintiff must have a copyright registration to bring an action for copyright infringement:

To bring an action for copyright infringement the plaintiff must have a copyright registration. 17 U.S.C. § 411 (2004). Such a registration is prima facie evidence that the

holder owns a valid copyright to the work in question. 17 U.S.C. § 410(c); see also Ford Motor, 930 F.2d at 290. Defendant has the burden of overcoming this presumption of validity. Williams Electronics, Inc. v. Arctic Int'l, Inc., 685 F.2d 870, 873 (3d Cir. 1982).

In *Scentsy, Inc., v. Chase, LLC et al*, Case 1:11-CV-00249-BLW, 2013, The United States District Court for the District of Idaho stated regarding the registration of a work for copyright protection and the scope of what is covered in the copyright that:

*Read in context, however, it seems clear that the court in Express, LLC meant that the scope of the presumption of validity which attaches to certain registered works under § 410(c) is limited by an author's disclosures. See e.g., id. at 1219 ("The Court finds that the scope of the registered copyright is relevant to the scope of the presumption of validity, and that **the scope of the registered copyright is determined by the actual registration application.**").*

Under sections 17 U.S.C. § 412, Registration as prerequisite to certain remedies for infringement; in order to collect statutory damages under any section of Title 17, a work must be registered with the copyright office as follows:

1. *If the work was preregistered under section 408(f), the work must be registered not later than the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement;*
2. *For an action instituted under section 411(c), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for any infringement of copyright in an unpublished work commenced before the effective date of its registration or any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work;*

Under section 17 U.S.C. § 412(2), in order to seek an award of statutory damages, a work must be registered within three months of its publication or the effective date of registration must be before any act of infringement.

If a work is not timely filed to be awarded statutory damages, this is sometimes referred to as a poor man's lawsuit as only actual damages will be awarded. This is why it is important to research the law and case law and determine what the possible outcome will be and whether it is worth the time, effort, and expense. If you are only awarded \$10,000 in actual damages and your costs are above this, you might actually lose money if you win. Congress put this stipulation on copyright protection to inspire people to register their works when they publish them, not after the works have been infringed.

It is important if you write a book, to submit the book to the Copyright Office within 3 months after it is published. All of the photographs that you are the author of within the book are normally covered under the copyright for that book. You can also submit your works online to the Copyright Office. Say you have a website with photographs that you wish to cover under copyright protection. You can register multiple photographs from the same year online under a single registration.

In *Derek Andrew Inc v. Poof Apparel Corporation*, No. 07-35048, June 11, 2008, the United States Court of Appeals, Ninth Circuit stated

Title 17 U.S.C. § 412(2) leaves no room for discretion, however. Section 412(2) mandates that, in order to recover statutory damages, the copyrighted work must have been registered prior to commencement of the infringement, unless the registration is made within three months after first publication of the work. See id. (precluding an award of attorneys' fees as well); Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 707 n. 5 (9th Cir.2004).

In this case, it is undisputed that Andrew's hang-tag was first published on August 11, 2003, and that its copyright registration became effective on June 15, 2005. It is also undisputed that the initial act of infringement occurred on May 9, 2005, when Andrew first came into possession of a Poof garment bearing an infringing hang-tag. Thus, Andrew's copyright in its Twisted Heart hang-tag was registered more than three months after its first publication, and Poof's infringement first occurred before the effective date of registration.

As seen in *Andrew*, if the copyright registration of a published work occurs after the infringement is found, then statutory damages and attorney fees are not permissible.

Example of notice of copyright registration in Complaint. In this example, there are twenty-four photographs that were infringed upon by the Defendants. Twelve of these photographs were timely registered after Plaintiff published his book containing these twelve photographs. All twenty-four photographs were registered before Plaintiff filed his lawsuit. Therefore, twelve of the photographs were timely filed under 17 U.S.C. § 412 and statutory damages can be sought for these twelve photographs under 17 U.S.C. § 504(c) and 1203(c)(3). For the twelve photographs not timely filed under 17 U.S.C. § 412 only actual damages can be sought per 17 U.S.C. § 504(b) and 1203(c)(2).

Example, Complaint, Section 4, "COPYRIGHT REGISTRATION"

10. Per 17 U.S.C. § 411 (Registration and civil infringement actions), all the Photographs (twenty-four) have been registered with the Copyright office. This includes twelve (12) of Plaintiff's twenty-four (24) photographs that are the subject of this litigation that were not timely filed under 17 U.S.C. § 412. Registration Number VA 1-234-567. See Exhibit A for a copy of the registration.
11. Per 17 U.S.C. § 412, (registration as prerequisite to certain remedies for infringement), Plaintiff's first book is titled *Authoritative Reference on Widgets*, ("Widget Book") was published in 1998. Twelve of the Photographs were published in Plaintiff's *Widget Book*. Plaintiff registered his *Widget Book* with the Copyright Office in a timely manner after Plaintiff published his book. Registration Number TXu987654321. See Exhibit A for a copy of the registration. See Exhibit B for a copy of those pages in the book showing the photos.

12. The Plaintiff's Photographs are copyrightable based upon the choice of camera, film, lens, lighting, angle, shading, focus, and tilting of the widgets.

Factual Background

Your Complaint should provide sufficient factual allegations to show that you are entitled to relief. The general guidelines for a Complaint are found under FRCP Rule 8. For example, a Complaint should contain "*a short and plain statement of the claim showing that the pleader is entitled to relief,*" and *each allegation must be simple, concise, and direct.*" The Complaint will provide a defendant fair notice of what the claim is and the grounds upon which it rests. This would be section 5, "FACTUAL BACKGROUND."

Infringement of copyrights

Under section 17 U.S.C. § 501, Infringement of Copyright; anyone who violates any of the exclusive rights of the copyright owner as provided by sections 17 U.S.C. § 106 through 122 or of the author as provided in section 17 U.S.C. § 106A(a), is an infringer of the copyright or right of the author. The owner of the copyrights is entitled to institute an action for any infringement of that particular right committed while he or she is the owner of it.

A claim of copyright infringement requires proof of "*(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.*" See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991).

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated that in order to prove copyright infringement, the plaintiff must prove: ownership of a valid copyright and that elements of their work were copied. They stated:

To prove copyright infringement, a plaintiff must establish both: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)); see also *FordMotor Co. v. SummitMotor Prods., Inc.*, 930 F.2d 277, 290 (3d Cir. 1991).

In *ANDREW PAUL LEONARD, d/b/a APL Microscopic vs. STEMTECH INTERNATIONAL INC*; Nos. 15-3198 & 15-3247; August 24, 2016, the Court stated regarding proving direct infringement:

To prove direct infringement, a plaintiff must show that (1) it owns a valid copyright; (2) another party copied elements of its work without authorization; and (3) that party engaged in volitional conduct. Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 203 (3d Cir. 2005); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004). Volitional conduct occurs when a party engages in "the act constituting infringement." *CoStar Group*, 373 F.3d at 551 (distinguishing between internet entities that serve as conduits for transmission of copyrighted material and those who have an "interest in the copy itself").

Leonard proved direct infringement by Stemtech distributors. He demonstrated that he owned the copyrights to the infringed images, and that he did not authorize or license the use of his images in Stemtech's advertising, marketing, and training materials. The materials containing his images ranged from webpages and PDFs to videos and a PowerPoint presentation promoting Stemtech products. This evidence provided a sufficient basis for a jury to reasonably conclude that the distributors directly infringed Leonard's copyrights.

In *Penguin Random House LLC vs. Frederik Colting and Melissa Medina, d/b/a Moppet Books*, 17-cv-386, the United States District Court, Southern District of New York stated regarding proving that the work was copied that:

to prevail on copyright infringement, they must prove that (1) they hold a valid ownership interest in the relevant copyright, (2) defendants have actually copied their works and (3) defendants' copying is illegal. That Actual copying may be established (a) by direct evidence of copying, or (b) by indirect evidence.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding the criteria for establish copying of the works:

The second element of copyright infringement is "copying of constituent elements of the work that are original." Feist, 499 U.S. at 361. Copying is proven by showing: (1) access to the copyrighted work; and (2) substantial similarity, i.e., that the alleged infringer uses material substantially similar to the copyrightable elements of the copyrighted work. Ford Motor, 930 F.2d at 291

To meet the substantial similarity test, Plaintiffs must satisfy two requirements. Dam Things from Den. v. Russ Berrie & Co., 290 F.3d 548, 562 (3d Cir. 2002). The first consideration, sometimes called "actual copying," is met if "there is sufficient similarity between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own." Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232 (3d Cir. 1986). Actual copying can be established by direct evidence or inferred through "similarities that are probative of copying between the two works, and expert testimony." Dam Things, 290 F.3d at 562 (quoting Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992)). Second, if there has been actual copying, then Plaintiff must establish that there has been "actionable copying." This standard is satisfied when the factfinder decides, using the perspective of the "ordinary layperson," that the "copying went so far as to constitute improper appropriation." Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975). Improper appropriation occurs when the "substantial similarities relate to the protectible material."¹¹ Dam Things, 290 F.2d at 562.

A two-step test to determine substantial similarity is necessary because "not all copying is copyright infringement." Feist, 499 U.S. at 361. If the defendant copies only non-copyrightable parts of plaintiff's work, there is copying, but not copyright infringement. See, e.g., Dam Things, 290 F.3d at 562. It follows that the less originality inherent in the underlying work, the closer the copy must be to the underlying work for the copying to be actionable. See Salkeld, 511 F.2d at 908. Such copyrights are sometimes described as "thin": when the unoriginal aspects of the work are subtracted from the work as a whole,

the remaining copyright “protects against only virtually identical copying.” Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) (citing Apple Computer v. Microsoft Corp., 35 F.3d 1435, 1439 (9th Cir. 1994) (“When the range of protect[i]ble and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”)). The only remaining question, then, is whether the actual copying of Plaintiffs’ photographs amounted to actionable copying by being “so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.” Educ. Testing Servs. v. Katzman, 793 F.2d 533, 541 (3d Cir. 1986) (quotation omitted).

As seen in the case law below, copyright infringement can occur even when the photograph is not directly copied. This can occur for example when one uses the work’s as a model, template or even inspiration and can be proved by direct evidence of proof of access and probative similarities in the two works.

In *Donald A. Harney vs. Sony Pictures Television, Inc., and A & E Television Networks, LLC*, Defendants, Appellees, United States Court of Appeals, First Circuit, January 7, 2013, the court concluded that the only common element of the two photographs for which Harney could take credit was *"the position of the individuals relative to the boundaries of the photo, although in the original Clark Rockefeller's face is closer to the camera and less of his body is visible."* It concluded that "[t]his limited sharing" did not infringe Harney's copyright. It explained:

On a sunny April day in 2007, freelancer Donald Harney snapped a photograph ("the Photo") of a blond girl in a pink coat riding piggyback on her father's shoulders as they emerged from a Palm Sunday service in the Beacon Hill section of Boston. Just over a year later, the pair in the Photo became a national media sensation. The father, soon-to-be revealed as a German citizen who had assumed the name Clark Rockefeller, had abducted his daughter during a parental visit and was being sought by law enforcement authorities. Harney's father-daughter photo was used in an FBI "Wanted" poster, and the image was widely distributed in the media as the abduction saga unfolded. Appellee Sony Pictures Television, Inc. ("Sony") later produced a made-for-television movie based on Gerhartsreiter's identity deception. Sony depicted the Photo in that movie using an image that was similar in pose and composition to Harney's original, but different in a number of details..... Harney's difficulty in alleging infringement is that almost none of the protectable aspects of the Photo are replicated in the Image. Without the Palm Sunday symbols, and without the church in the background — or any identifiable location — the Sony photograph does not recreate the original combination of father-daughter, Beacon Hill and Palm Sunday. Although the two photographs appear similar upon a first glance, that impression of similarity is due largely to the piggyback pose that was not Harney's creation and is arguably so common that it would not be protected even if Harney had placed Gerhartsreiter and Reigh in that position.

In *Jonathan Mannion v. Coors Brewing Company and Carol H. Williams Advertising*, No. 04 Civ. 1187, United States District Court, S.D. New York, July 21, 2005, said in summation that Monnion was a freelance photographer who was hired by SLAM, a basketball magazine to photograph basketball legend Kevin Garnett in connection with an article about the star titled

above the clouds. Coors Brewing Company created a similar image using a muscular black man, in a similar pose than Garnett shot against a cloudy backdrop and included similar clothes and jewelry to Garnett. In a Motion for Summary Judgment by both parties, the District Court found that the two photographs shared similar lighting, cloudy sky for a backdrop, similar clothing and jewelry, but that there were also many differences in the images. The Court denied both parties Summary Judgment Motions and stating it was possible that a reasonable jury could find substantial similarities either present or absent with the basis of copyright infringement being found either way. Mannion prevailed showing that there was copyright infringement.

The Garnett Photograph, which is reproduced below, is a three-quarter-length portrait of Garnett against a backdrop of clouds with some blue sky shining through. The view is up and across the right side of Garnett's torso, so that he appears to be towering above earth. He wears a white T-shirt, white athletic pants, a black close-fitting cap, and a large amount of platinum, gold, and diamond jewelry ("bling bling" in the vernacular), including several necklaces, a Rolex watch and bracelet on his left wrist, bracelets on his right wrist, rings on one finger of each hand, and earrings. His head is cocked, his eyes are closed, and his heavily-veined hands, nearly all of which are visible, rest over his lower abdomen, with the thumbs hooked on the waistband of the trousers. The light is from the viewer's left, so that Garnett's right shoulder is the brightest area of the photograph and his hands cast slight shadows on his trousers. As reproduced in the magazine, the photograph cuts off much of Garnett's left arm.

"To prove infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's." "Actual copying" — which is used as a term of art to mean that "the defendant, in creating its work, used the plaintiff's material as a model, template, or even inspiration" — may be shown by direct evidence, which rarely is available, or by proof of access and probative similarities (as distinguished from "substantial similarity") between the two works.

Originality of the Garnett Photograph - There can be no serious dispute that the Garnett Photograph is an original work. The photograph does not result from slavishly copying another work and therefore is original in the rendition. Mannion's relatively unusual angle and distinctive lighting strengthen that aspect of the photograph's originality. His composition — posing man against sky — evidences originality in the creation of the subject. Furthermore, Mannion instructed Garnett to wear simple and plain clothing and as much jewelry as possible, and "to look `chilled out.'" His orchestration of the scene contributes additional originality in the creation of the subject.

Other differences, however, are in the nature of changes rather than additions. One image is black and white and dark, the other is in color and bright. One is the mirror image of the other. One depicts only an unidentified man's torso, the other the top three-fourths of Kevin Garnett's body. The jewelry is not identical. One T-shirt appears to fit more tightly than the other. These changes may enter the analysis because "[i]f the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are, within the context of plaintiff's work, of minimal importance... then no infringement results."

The parties have catalogued at length and in depth the similarities and differences between these works. In the last analysis, a reasonable jury could find substantial

similarity either present or absent. As in Kisch v. Ammirati & Puris Inc., which presents facts as close to this case as can be imagined, the images are such that infringement cannot be ruled out — or in — as a matter of law.

In *Temple Island Collections Limited vs. New English Teas Limited and Nicholas John Houghton*, British Court, Judge Birss QC, November 28th, 2011, Mr. Fielder of Temple Island Collections Limited claimed copyright ownership of a bright red London Routemaster bus on the Westminster Bridge with the House of Parliament in the background. The bridge and Parliament house are in black and white. Mr. Fielder used Photoshop to convert the bridge and building to black and white, removing also people in the image, removing the skyline, and stretching the image. Mr. Houghton of New English Teas Limited created a similar photograph with a red bus on a black and white Westminster Bridge and House of Parliament, but in a different perspective. Mr. Houghton hired Sphere Design to manipulate the photographs he had taken. The Court stated that

Copyright is infringed by reproducing the whole or a substantial part of a work in a material form (s16 and s17 of the 1988 Act). It was common ground between the parties that a "substantial part" is a matter of quality not quantity. Mr Edenborough summed up the task here based on Designers Guild in the House of Lords. First one asks whether there has been copying and if so which features have been copied, and then asks whether that represents a substantial part of the original. One does not then ask if the alleged infringement looks on the whole similar, because one can reproduce a substantial part without necessarily producing something that looks similar even though of course it may do so.

I have not found this to be an easy question but I have decided that the defendants' work does reproduce a substantial part of the claimant's artistic work. In the end the issue turns on a qualitative assessment of the reproduced elements. The elements which have been reproduced are a substantial part of the claimant's work because, despite the absence of some important compositional elements, they still include the key combination of what I have called the visual contrast features with the basic composition of the scene itself. It is that combination which makes Mr Fielder's image visually interesting. It is not just another photograph of clichéd London icons.

One of the exceptions to copyright infringement is the Fair Use doctrine. Under section 17 U.S.C. § 107, Limitation of exclusive rights, fair use; the fair use of a copyrighted work is permitted for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, and is not an infringement of copyright. The guidelines in determining whether the use made of a work in any particular case is a fair use the factors to be considered are listed in section 17 U.S.C. § 107.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated regarding fair use:

A fair use is one made "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research." 17 U.S.C. § 107 (2004). Fair use is an affirmative defense upon which the alleged infringer has the burden of proof. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 197 (3d Cir. 2004). A court must take into account four factors when determining whether a use is fair:

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) *the nature of the copyrighted work;*
- (3) *the amount and substantiality of the portion used in relation to the copyrighted work as a whole;*
- (4) *the effect of the use upon the potential market for or value of the copyrighted work.*

17 U.S.C. § 107. Each factor must be “explored, and the results weighed together, in light of the purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (citations omitted). Generally, “the analysis under each statutory factor concentrates on the copy and the original work from which it derives.” *Video Pipeline*, 342 F.3d at 198. Thus, this Court will now examine each statutory factor in turn by comparing 1000 Patterns with Plaintiffs’ photographs.

a. Purpose and Character of Use

The first factor is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). When the new work is used commercially, “its use will less likely qualify as fair.” *Video Pipeline*, 342 F.3d at 198. Here, it is undisputed that 1000 Patterns is sold commercially. (Joint Pretrial Stmt. Ex A ¶¶ 302-03.) While this militates against a finding of fair use on the first factor, it is not the end of the inquiry. *Video Pipeline*, 342 F.3d at 198. The Court must also examine the character and purpose of the new work compared to that of the original. If the new work is “transformative,” in that it alters the original “with new expression, meaning, or message,” it is more likely to be deemed fair use than if it “merely supersede[s] the objects of the original creation.” *Campbell*, 510 U.S. at 579 (holding song parody adequately transformative to be fair use of original). Defendants claim that their book is transformative because while Plaintiffs’ books concentrate on a class of collectible fabrics, 1000 Patterns is an historical reference book of design patterns. This argument fails. Both Plaintiffs’ books and Defendants’ 1000 Patterns are aimed at designers, artists, and art enthusiasts, and both share a common purpose – to inform this audience about patterns and fabrics. (Compare Pls.’ Trial Ex. 18 (describing 1000 Patterns as “an intriguing reference” for those with “a[n] . . . interest in art and ornamentation”) with Pls.’ Trial Ex. 26 (calling *Stripes*, one of Plaintiffs’ books, “an invaluable reference for artists of every medium”).) Therefore, 1000Patterns “merely supersede[s]” the objects of Plaintiffs’ books (and their photographs). *Campbell*, 510 U.S. at 579. Accordingly, the first fair use factor weighs in favor of Plaintiffs.

b. Nature of the Copyrighted Work

The second fair use factor instructs courts to consider “the nature of the copyrighted work.” 17U.S.C. § 107(2). Some works, such as fictional, creative works, are closer to the core of intended copyright protection than primarily factual works. *Campbell*, 510 U.S. at 586; see also *Harper & Row*, 471 U.S. at 563. In addition, one key factor tending to negate a finding of fair use on the second factor is whether the original work is unpublished. See *Harper & Row*, 471 U.S. at 550-51 (reasoning that fair use is predicated on author’s implied consent to “reasonable and customary” use when work released for public consumption; thus, fair use not traditionally recognized as defense to copying from unpublished works). Here, Schiffer has published all the books which contain the photographs at issue, which militates for fair use. (Pls.’ Trial Exs. 19-32.) Moreover, while “photographs taken for aesthetic purposes[] are creative in nature and thus fit

squarely within the core of copyright protection,” *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), the Plaintiffs’ photographs here are taken less for aesthetic purposes than some other photographs might be. On the other hand, the photographs are certainly more creative than purely factual works such as a compilation of telephone numbers. See, e.g., *Feist*, 499 U.S. at 358. In sum, this Court cannot say that the second fair use factor militates strongly in either party’s favor.

c. Amount and Substantiality of the Work Copied

The third factor requires the court to calculate “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor entails both a quantitative and a qualitative analysis. *Campbell*, 510 U.S. at 587; see also *Video Pipeline*, 342 F.3d at 201. The quantitative inquiry simply examines how much of the copyrighted work was taken. See, e.g., *Video Pipeline*, 342 F.3d at 201 (examining two minute clips taken from two hour movies (about one and a half percent) and concluding that “quantitatively . . . the portion taken is quite small”). The qualitative inquiry looks to whether the alleged infringer “took what was essentially the heart” of the original work. *Harper&Row*, 471 U.S. at 564-65 (holding “heart” taken where most interesting and powerful parts of underlying work appropriated, “precisely because they qualitatively embodied . . . distinctive expression”). Both the quantitative and the qualitative inquiries favor Plaintiffs. Defendants argue that the “copyrighted work” should be measured in terms of each Schiffer book as a whole. Therefore, according to Defendants, as each of the thirteen Schiffer books contain at least 300 photographs, and Plaintiffs allege infringement of 118 photographs, 1000 Patterns used only about four percent of this total. Defendants’ argument, however, misapprehends the proper frame of reference. Each photograph is an individually copyrighted work, and it is the amount used of each one that must be analyzed. Defendants cut out and scanned the entirety of each of Plaintiffs’ photographs. (R. at 111 (Aug. 24, 2004).) Although Defendants occasionally cropped Plaintiffs’ photographs before including them in 1000 Patterns, each photograph was scanned in its entirety. (*Id.*) Therefore, quantitatively Defendants took all of Plaintiffs’ work. Qualitatively, moreover, the Court concludes that the “heart” of Plaintiffs’ work has been appropriated. Many of Plaintiffs’ photographs are reproduced in 1000 Patterns in their entirety. Thus, if these photographs have a “heart,” that heart was necessarily taken by Defendants. Further, even those photographs which Defendants cropped before placing them into 1000 Patterns had, at the least, one full repetition of the pattern appropriated by Defendants. Consequently, the Court holds that the third fair use factor favors Plaintiff.

d. Effect on Potential Market or Value

The last fair use factor calls on the court to evaluate “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Analysis of this factor requires courts to consider whether the allegedly infringing work is a “market substitute” for the original work, both in terms of “the extent of market harm caused by the particular actions of the alleged infringer” and also “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 490 (quotation omitted). The instant case is a quintessential example of an allegedly infringing work serving as a market substitute for the original. Cf. *Sony Corp. of Am. V Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (finding no market

substitution when copying done for purely non-commercial purpose). Defendants unerringly copied Plaintiffs' photographs from Plaintiffs' books on design and pattern and inserted them, without significant alteration, into their own book on design and pattern. Therefore, this "commercial use amounts to mere duplication of the entirety of an original," and thus "supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur." Campbell, 510 U.S. at 591 (citation and quotation omitted).

Remedies, injunctions, and damages for copyright infringement

Under section 17 U.S.C. § 502, Remedies for infringement: Injunctions; a court having jurisdiction of a civil action arising under this title may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

In Polygram International Publishing, Inc., Yellow Brick Road Music, Aerostation Corp., MCA, Inc., Bourne Co., Williamson Music, Inc., Cy Coleman, Jobete Music Co., Inc., Brockman Enterprises, Inc., Fourth Floor Music, Inc., Hudmar Publishing Co., Inc., Cowbella Music, Bleu Disque Music Co., Inc., WB Music Corp., and Webo Girl Publishing, Inc., Plaintiffs v. NEVADA/TIG, INC., f/k/a Interface Group, Inc., Interface Group-Massachusetts, Inc., and Interface Group-Nevada, Inc., Defendants and Third Party Plaintiffs v. McGRAW-HILL, INC., Third Party Defendant. Civ. A. No. 92-10785-Rek, United States District Court, D. Massachusetts, June 20, 1994, the Court stated regarding injunctions under 502:

The Copyright Act authorizes injunctive relief to the prevailing party in a copyright infringement case. 17 U.S.C. § 502(a). An injunction is appropriate if there is a "substantial likelihood of further infringement of plaintiffs' copyrights." Milene Music, Inc. v. Gitayci, 551 F.Supp. 1288, 1295 (D.R.I.1982). Courts routinely authorize injunctions in cases in which the owner of an establishment has, after repeated warnings by ASCAP that performances at the establishment violated the Copyright Act, nevertheless refused to purchase a license. See, e.g., Id.; Famous Music Corp. v. Bay State Harness Horse Racing, 423 F.Supp. 341 (D.Mass.1976) aff'd, 554 F.2d. 1213 (1st Cirr. 1977).

Under section 17 U.S.C. § 503, Remedies for infringement: Impounding and disposition of infringing articles; a court may order the impounding or destruction of all material that infringed on the owner's copyrights.

In Microsoft Corporation v. Jun Yak and others, Civil Action No. 3:10-cv-00162(VLB), United States District of Connecticut, February 18, 2010, Preliminary Injunction, the Court stated regarding injunction of copyrighted material:

*Additionally, § 503(a) of the Copyright Act authorizes a court to order seizure and impoundment of "all copies. . . claimed to have been made or used in violation of the copyright owner's exclusive rights" and devices by means of which such copies may be reproduced. Impoundment, pursuant to 17 U.S.C. § 503 is appropriate when a Plaintiff establishes a prima facie case of copyright infringement. See U2 Home Entertainment, Inc. v. Bowery Music City, Inc., No. 3 civ. 8909, WL 22889738 at *1 (S.D.N.Y, December*

8, 2003). Similarly, the Lanham Act authorizes a “seizure of goods and counterfeit marks involved in [a Lanham Act] violation and the means of making such marks, and records documenting the manufacture, sale or receipt of things involved in the violation.” 15 U.S.C. § 1116. The Eastern District of New York provides useful guidance:

Where plaintiffs have shown that a danger exists of destroying or transferring infringing goods, courts in this Circuit have not hesitated to grant ex parte orders under either the Lanham Act or the Copyright Act. Moreover, even if equipment may be used for a legitimate purpose, it is not protected from seizure if it has been employed for the illegal purposes alleged. Though in ordinary cases orders that disrupt the status quo are frowned upon, in infringement cases the policy allowing ex parte seizure and impoundment is clear: “If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of „notice,” and it is surely not what the authors of the rule either anticipated or intended.”

Under section 17 U.S.C. § 504, Remedies for infringement: Damages and profits; an infringer of copyright is liable for either the copyright owner’s actual damages and any additional profits or statutory damages. There are two types of actual damages: the damages suffered as a loss of the infringement; profits of the infringer that are attributable to the infringement. In establishing profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

For statutory damages under section 17 U.S.C. § 504(c), the copyright owner can elect to collect statutory damages instead of actual damages at any time before the final judgment. An award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. If the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. There are also exceptions to the award of statutory damages that can be seen in section 17 U.S.C. § 504(c) in Appendix A.

Actual Damages

Regarding profits from the sales of the material and profits from advertisements - *Richard REINS DORF, an individual, Plaintiff, v. SKECHERS U.S.A., a Delaware corporation; Skechers U.S.A., Inc., II, a Delaware corporation, Defendants.* United States District Court, C.D. California. 6 Feb 2013, the Court stated:

A copyright owner is entitled to recover "any profits of [an] infringer that are attributable to the infringement." 17 U.S.C. § 504(b). Recoverable profits include an infringer's "indirect profits," which generally arise when an infringer uses "a copyrighted work to sell another product."

Regarding actual damages for copyright infringement - Fair Market Value - *Chris Gregerson vs. Vilana Financial Inc.*, District Court of Minnesota, 2,15,2008, the Court stated:

Section 504(b) entitles the injured party to actual damages to compensate for the injury resulting from the infringement but also entitles the injured party to the infringer's profits deriving from the infringement. "By stripping the infringer not only of the licensing fee but also of the profit generated as a result of the use of the infringed item, the law makes clear that there is no gain to be made from taking someone else's intellectual property without their consent." Walker v. Forbes, Inc., 28 F.3d 409, 412 (4th Cir. 1994). The Supreme Court has made very clear that the purpose behind the measure of damages set forth in § 504(b) is "to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement." Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940). Plaintiff could have sought the profits Defendants derived from the infringement as damages but chose not to do so. Accordingly, Plaintiff's damages are limited to actual damages—that is, the fair market value of Defendants' uses of the Skyline photo. Plaintiff claims the fair market value for all uses of his Skyline photo by Defendants is \$4,462. The Court awards Plaintiff \$4,462 in actual damages

Regarding Actual Damages – Profits - Jeff KOONS; Sonnabend Gallery, Inc., Defendants-Appellants-Cross-Appellees. United States Court of Appeals, Second Circuit. Decided April 2, 1992, the Court stated:

In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

In the example Complaint, where twenty-four photographs were used in the Third Edition in violation to Plaintiff's copyrights; with twelve of the photographs timely filed per 17 U.S.C. § 412 and eligible for statutory damages. How would actual damages and a percentage of the profits be calculated? In calculating the actual damages, one means is to determine the fair market value. Let's say there are other books on widgets. Contacting the publishers of these widget books and determining what rate they normally pay for photographs used in their books from outside sources is a good indication of the rate. If you can get the average of three rates from three different publishers, that would be form the basis of the fair market value per photograph. Multiplying this amount against the number of photographs, let's say (12 x \$100) would provide an estimated damage amount of \$1,200 for the fair market value of the photographs infringed. It is important to note that for the twelve photographs that were timely registered and eligible for statutory damages, actual damages are not available if seeking statutory damages.

For the percentage of the profits, the Plaintiff would present the gross profits for the infringing work. This might normally be learned through discovery. The Defendant would present their deductible expense such as the cost of printing, publishing, and advertising the book. The Defendants would also calculate the elements of profit attributed to factors other than the copyrighted work, perhaps the percentage of infringing photographs versus the total photographs used in the book. For example, let's say XYW123 made \$100,000 in gross profits for the Third Edition. Take out \$45,000 in deductible expenses in the publishing of the book leaving \$55,000.

If there are 100 total photographs in the Third Edition, then $12 / 100 = 12\%$. Taking 12% of \$55,000 would create an estimated percentage of profits of \$6,600.

Statutory Damages

Regarding statutory damages for copyright infringement -Willful - *Chris Gregerson vs. Vilana Financial Inc.*, District Court of Minnesota, 2,15,2008, the Court stated:

Plaintiff seeks damages for Defendants' use of the Kenwood photo under 17 U.S.C. § 504(c)(2). Section 504(c)(2) provides that "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000." In determining the proper measure of statutory damages, the Court considers what is just in a particular case, the nature of the copyright, and the circumstances of the infringement. Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990).

The standard for determining whether the infringer's conduct was willful is "whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded that possibility." "[E]ven in the absence of evidence establishing the infringer's actual knowledge of infringement, a plaintiff can still prove willfulness by proffering circumstantial evidence that gives rise to an inference of willful conduct." the Court concludes that Defendants obtained the photos from Plaintiff's website and thus, willfully infringed Plaintiff's copyright. In so finding, the Court awards Plaintiff \$10,000 in statutory damages. This amount serves the interests of justice in acknowledging both the need to compensate Plaintiff and deter Defendants from future infringement.

Regarding statutory damages for copyright infringement -Willful - *Friedman vs. Live Nation Merchandise Inc.*, 9th district court of appeal, Glen E. Friedman vs. Live Nation Merchandise, Inc., United States Court of Appeals for the Ninth Circuit, February 11, 2016, the Court stated:

Under the Copyright Act, the amount of damages a plaintiff may recover for infringement depends on whether the infringement was "committed willfully." 17 U.S.C. § 504(c)(2). The copyright owner has the burden of proving willfulness. Id. "[A] finding of 'willfulness' in this context can be based on either 'intentional' behavior, or merely 'reckless' behavior." In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008) (citations omitted). "To prove 'willfulness' under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of 'reckless disregard' for, or 'willful blindness' to, the copyright holder's rights." Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc., 658 F.3d 936, 944 (9th Cir. 2011) (quoting Island Software & Computer Serv., Inc. v. Microsoft Corp., 413 F.3d 257, 263 (2d Cir. 2005)).

A determination of willfulness requires an assessment of a defendant's state of mind. "Questions involving a person's state of mind . . . are generally factual issues inappropriate for resolution by summary judgment." F.T.C. v. Network Servs. Depot, Inc., 617 F.3d 1127, 1139 (9th Cir. 2010) (quoting Braxton-Secret v. A.H. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985)). Indeed, as the district court noted, Live Nation was not able to cite any "cases in which a court has granted summary judgment in favor of a defendant on the issue of willfulness."

Regarding number of infringements - Statutory Damages – *Columbia Pictures Television, Inc., v. Krypton Broadcasting of Birmingham, Inc.*, United States Court of Appeals, Ninth Circuit, July 09, 2001, the Court stated:

Copyright Act § 504(c)(1) permits the copyright owner to recover “an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.” 17 U.S.C. § 504(c)(1) (2001) (emphasis added). In addition, § 504(c)(1) states that “all the parts of a compilation or derivative work constitutes one work.” Id. (emphasis added). Thus, under the Copyright Act, “each work infringed may form the basis of one award.” Columbia Pictures, 106 F.3d at 294 (emphasis added). Although the Copyright Act does not define the term “work,” every circuit to address the issue has held that “separate copyrights are not distinct works unless they can ‘live their own copyright life.’” Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C.Cir.1990) (quoting Robert Stigwood Group, Ltd. v. O'Reilly, 530 F.2d 1096, 1105 (2d Cir.1976)). Here, the district court initially held a bench trial and found that Feltner was liable for \$8.8 million in statutory damages for infringing 440 works. This award amounts to approximately \$20,000 per work infringed. That award was vacated, however, after the Supreme Court held that Feltner was entitled to a jury trial on the amount of statutory damages. Feltner, 523 U.S. at 355, 118 S.Ct. 1279. The case was then remanded and tried to a jury, and the jury awarded Columbia \$31.68 million in statutory damages for the same 440 works infringed. This award amounts to approximately \$72,000 per work infringed. Although the jury's \$31.68 million verdict is substantial, it is equal to a per work infringed award that is well within the statutory range for willful infringement.

Regarding number of infringements - Statutory Damages – *Glen E. Friedman vs. Live Nation Merchandise, Inc.*, United States Court of Appeals for the Ninth Circuit, February 11, 2016, the Court stated:

The number of awards available under this provision depends not on the number of separate infringements, but rather on (1) the number of individual “works” infringed and (2) the number of separate infringers. See Walt Disney Co. v. Powell, 897 F.2d 565, 569 (D.C. Cir. 1990).

We therefore hold that Section 504(c)(1)'s provision of separate statutory damage awards for the infringement of each work “for which any two or more infringers are liable jointly and severally” applies only to parties who have been determined jointly and severally liable in the course of the liability determinations in the case for the infringements adjudicated in the action.

If each defendant is liable for only one of the infringements that are the subject of the lawsuit, then each defendant will be liable for a separate set of statutory damages (each with its own minimum). Suppose, for example, a single complaint alleges infringements of the public performance right in a motion picture against A, B, and C, each of whom owns and operates her own motion picture theater, and each of whom, without authority, publicly performed plaintiff's motion picture. If A, B, and C have no relationship with one another, there is no joint or several liability as between them, so that each is liable for at least a minimum \$750 statutory damage award. Suppose, further, that D, without

authority, distributed plaintiff's motion picture to A, B, and C. Although A, B, and C are not jointly or severally liable each with the other, D will be jointly and severally liable with each of the others. Therefore, three sets of statutory damages may be awarded, as to each of which D will be jointly liable for at least the minimum of \$750. However, D's participation will not create a fourth set of statutory damages.

Columbia Pictures's emphasis on the status of the downstream infringers as defendants is grounded in the language of the statute. Section 504(c)(1) provides for "an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally" 17 U.S.C. § 504(c)(1) (emphasis added). Any downstream infringements cannot be "involved in the action" unless the alleged infringers responsible for those infringements were joined as defendants in the case, and the particular alleged infringements involving them adjudicated.

Under section 17 U.S.C. § 505, Remedies for infringement: Cost and attorney fees; the Court may allow the recording of full costs and reasonable attorney fees to the prevailing part.

In *Fogerty v. Fantasy, Inc.*, (1994), No. 92-1750, the United States Supreme Court stated regarding awarding attorney fees that:

Prevailing plaintiffs and prevailing defendants must be treated alike under 505; attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. Pp. 4-18.

In *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 (2016), the United States Supreme Court stated that the Court should give consideration to the reasonableness of the prevailing and losing party's positions when awarding costs and attorney fees:

Section 505 of the Copyright Act provides that a district court "may . . . award a reasonable attorney's fee to the prevailing party." 17 U. S. C. §505. The question presented here is whether a court, in exercising that authority, should give substantial weight to the objective reasonableness of the losing party's position. The answer, as both decisions below held, is yes—the court should. But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party's fee application.

The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant—whether plaintiff or defendant—is clearly correct, the likelihood that he will recover fees from the opposing (i.e., unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney's fees in a protracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has

an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side's litigation costs mount. All of those results promote the Copyright Act's purposes, by enhancing the probability that both creators and users (i.e., potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

What is more, Wiley's approach is more administrable than Kirtsaeng's. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense. That is closely related to what the court has already done: In deciding any case, a judge cannot help but consider the strength and weakness of each side's arguments.

All of that said, objective reasonableness can be only an important factor in assessing fee applications—not the controlling one. As we recognized in Fogerty, §505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions. See supra, at 4. That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones). For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses. See, e.g., Viva Video, Inc. v. Cabrera, 9 Fed. Appx. 77, 80 (CA2 2001). Or a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case. See, e.g., Bridgeport Music, Inc. v. WB Music Corp., 520 F.3d 588, 593–595 (CA6 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable). Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals.

Under section 17 U.S.C. § 507, Limitations of actions; No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

In *Petralla v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, 2014, the United States Supreme Court stated regarding the time limitations of commencing a copyright infringement lawsuit that the copyright owner can only seek damages within the three year time limit, but the copyright owner does not have to file a complaint within 3 years of their first knowledge of an infringement.

The Act's statute of limitations provides: "No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued." §507(b). A claim ordinarily accrues when an infringing act occurs. Under the separate-accrual rule that attends the copyright statute of limitations, when a defendant has committed successive violations, each infringing act starts a new limitations period. However, under §507(b), each infringement is actionable only within three years of its occurrence. Laches cannot be invoked as a bar to Petrella's pursuit of a claim for damages brought within §507(b)'s three-year window. Pp. 11–19. (a) By permitting a successful plaintiff to

gain retrospective relief only three years back from the time of suit, the copyright statute of limitations itself takes account of delay. Brought to bear here, §507(b) directs that Petrella cannot reach MGM's returns on its investment in Raging Bull in years before 2006.

We consider first whether, as the Ninth Circuit held, laches may be invoked as a bar to Petrella's pursuit of legal remedies under 17 U. S. C. §504(b). The Ninth Circuit erred, we hold, in failing to recognize that the copyright statute of limitations, §507(b), itself takes account of delay. As earlier observed, see supra, at 5–6, a successful plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringement in earlier years. Profits made in those years remain the defendant's to keep. Brought to bear here, §507(b) directs that MGM's returns on its investment in Raging Bull in years outside the three-year window (years before 2006) cannot be reached by Petrella. Only by disregarding that feature of the statute, and the separate-accrual rule attending §507(b), see supra, at 4–5, could the Court of Appeals presume that infringing acts occurring before January 6, 2006 bar all relief, monetary and injunctive, for infringement occurring on and after that date. See 695 F. 3d, at 951; supra, at 9–10.¹³ Moreover, if infringement within the three-year lookback period is shown, the Act allows the defendant to prove and offset against profits made in that period “deductible expenses” incurred in generating those profits. §504(b).

It is hardly incumbent on copyright owners, however, to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it. Fan sites prompted by a book or film, for example, may benefit the copyright owner. See Wu, Tolerated Use, 31 Colum. J. L. & Arts 617, 619–620 (2008). Even if an infringement is harmful, the harm may be too small to justify the cost of litigation.

Section 507(b)'s three-year limitations period, however, coupled to the separate-accrual rule, see supra, at 3–6, avoids such litigation profusion. It allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle. She will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered.

It is important to note that in the example below, the facts that form the basis of the claim are laid out explicitly. Under Federal Rules of Civil Procedure Rule 8, the Plaintiff's Complaint should contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” and “each allegation must be simple, concise, and direct.” The Complaint should state plausible grounds for the relief sought and it need merely contain sufficient factual allegations to raise a right to relief above the speculative level.

Example, Complaint, Section 6, “COUNT 1, COPYRIGHT INFRINGEMENT, 17 U.S.C. § 106, 501, 502, 503, 504, and 505.

59. Plaintiff incorporates herein by this reference each and every averment contained in paragraphs 1 through 58, inclusive.

60. Plaintiff independently created the Plaintiff's 24 infringed Photographs that were used in the Third Edition. Many of the widgets used for the Plaintiff's Photographs are owned by the Plaintiff. The Plaintiff's creative choices and incremental contributions to create the Plaintiff's Photographs include the choice of camera, film, lens, lighting, angle, shading, focus, and tilting of the widgets.
61. Plaintiff has submitted Plaintiff's Photographs for copyright registration with the United States Copyright Office. Many of the Photographs were also used in Plaintiff's books, many of which books have been registered with the United States Copyright Office. Plaintiff has included a copy of the Certificate of Registration for Plaintiff's Photographs, see Exhibit A.
62. Plaintiff did not authorize or permit his images to be used in the Third Edition. Plaintiff specifically stated to White in March 2010 that there was no permissions to use Plaintiff's Photographs in any future edition of *Expert Guide to Widgets* (derivative works). Such termination is similar with 17 U.S.C. § 203(b)(1). Therefore, starting in 2010, White was aware that use of Plaintiff's Photographs in future editions (derivative works) of *Expert Guide to Widgets* would be an infringement of Plaintiff's copyrights. Plaintiff specifically stated several times to White through emails that there was no permission to use Plaintiff's Photographs without Plaintiff's name (CMI) with Plaintiff's Photographs.
63. Defendants were aware of the infringement of Plaintiff's Photographs in the Third Edition. Between 2010 and 2015, Plaintiff stated to White several times through emails and verbally that Defendants were not permitted to use Plaintiff's Photographs in future editions of *Expert Guide to Widgets* (derivative works) unless Plaintiff's CMI information (Plaintiff's name) was included with Plaintiff's Photographs. At the 2010 Cherry Hill New Jersey book show, White stated to Plaintiff that Plaintiff's Photographs would be removed from the next edition of *Expert Guide to Widgets*. Plaintiff agreed with White and stated that any permission of Plaintiff's Photographs was terminated and not permitted in any future *Expert Guide to Widgets* edition.
64. XYZ123 announced the next edition of *Expert Guide to Widgets* (Third Edition) in June of 2015. Plaintiff emailed White in June, 2015 and requested acknowledgement that either Plaintiff's Photographs were removed or that Plaintiff's CMI information was included with Plaintiff's Photographs. White responded to Plaintiff by through email in June, 2015 stating that Plaintiff's Photographs would be removed. Plaintiff stated further in an email that no

permission was granted for the use of Plaintiff's Photographs in the Third Edition. From these emails, White was aware again in 2015 that Plaintiff's Photographs were not permitted to be used in the Third Edition unless the Plaintiff's CMI information was included with Plaintiff's Photographs and the usage of Plaintiff's Photographs in the Third Edition would be a violation of Plaintiff's copyrights.

65. Defendants copied Plaintiff's Photographs from the Second Edition into the derivative work, the Third Edition without permission or consent of the Plaintiff and in violation to Plaintiff's copyrights.

66. Defendant's actions were intentional, willful, and of reckless disregard to Plaintiff's rights. In 2010, White told Plaintiff that Plaintiff's Photographs would be removed from future editions of the *Expert Guide to Widgets*, even though they were not. In 2015, when asked, White confirmed that Plaintiff's Photographs were removed from the Third Edition or that Plaintiff's CMI information was included with the Photographs even though Plaintiff's Photographs were included in the Third Edition without Plaintiff's CMI. Plaintiff told Defendants in 2010 and 2015 that Plaintiff's Photographs were not permitted without Plaintiff's CMI. Twenty-Four of Plaintiff's Photographs were included in the Third Edition without Plaintiff's knowledge or permission and without Plaintiff's CMI information being listed with Plaintiff's Photographs as the owner of the Photographs.

67. Defendant's actions were with willful blindness to Plaintiff's copyrights. In the First Edition, Plaintiff's Photographs were clearly listed with "*photos courtesy of Kevin Flynn.*" Plaintiff stated this to the Defendants in 2010 and 2015. Defendants knew which photographs Plaintiff claimed were his. The First Edition clearly stated that these photographs were from the Plaintiff. Defendants never stated to Plaintiff between 2010 and 2015 that there would be no name listed with the actual photographs in the Third Edition. Defendants knew there was a risk that the Photographs were the Plaintiff's Photographs in reckless disregard to the Plaintiff's copyrights, chose to use Plaintiff's Photographs in the Third Edition.

68. Defendants derived (and continues to derive) direct financial benefit from the infringement of Plaintiff's copyrighted Photographs in the Third Edition through sales of the Third Edition and through advertisements sold in the Third Edition.

69. Defendants have not acted reasonably or in good faith in response to Plaintiff's notices of infringements and repeated infringements. As an example, when asked to confirm that

Plaintiff's Photographs were removed or that the CMI was included with Plaintiff's Photographs in the Third Edition, White confirmed that the Plaintiff's photographs were removed, when the Plaintiff's Photographs were included in the Third Edition without Plaintiff's CMI.

70. Through their conduct averred herein, Defendants have been willful, intentional, and purposeful, in disregard of and indifference to Plaintiff's rights.
71. Through their conduct averred herein, Defendants have infringed Plaintiff's copyright in violation of the Copyright Act, 17 U.S.C. § 106 and 501.
72. As a direct and proximate result of Defendants infringements of Plaintiff's copyrights and exclusive rights under copyright laws, Plaintiff is also entitled to actual damages suffered as a result of the infringement and Defendants profits attributable to the infringement, pursuant to U.S.C. § code 504(b).
73. Alternatively, for the Plaintiff's Photographs that were timely filed per 17 U.S.C. § 412, Plaintiff is entitled to maximum statutory damages pursuant to 17 U.S.C. § 504(c)(1) in the amount of \$30,000 for all infringements involved in the action, or such other amounts as may be proper under 17 U.S.C. § 504(c).
74. Alternatively, for the Plaintiff's Photographs that were timely filed per 17 U.S.C. § 412, as Defendant's actions were willful, Plaintiff is entitled to the maximum statutory damages, pursuant to 17 U.S.C. § 504(c)(2), in the amount of \$150,000 with respect to each of the works infringed, or such other amounts as may be proper under 17 U.S.C. § 504(c).
75. Plaintiff further is entitled to their attorney fees and full costs pursuant to 17 U.S.C. § 505.
76. Plaintiff is entitled to injunctive relief prohibiting further contributory infringements of Plaintiff's copyrights pursuant to 17 U.S.C. § 502.
77. Plaintiff is entitled to the impounding and destruction of the infringing copies of the Third Edition pursuant to 17 U.S.C. § 503.

SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT

Contributory and vicarious infringement are theories of secondary liability for copyright infringement: vicarious liability, derived from the similar concept in the law of employer-employee relations, and contributory infringement, derived from the tort concept of enterprise liability. Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.

Vicarious infringement occurs when one profits from direct infringement while declining to exercise a right to stop or limit it. To establish vicarious infringement, a plaintiff must prove that the defendant had (1) the right and ability to supervise or control the infringing activity; and (2) a direct financial interest in such activities.

Contributory infringement occurs by intentionally inducing or encouraging direct infringement. To establish a claim of contributory infringement, a plaintiff must show: (1) a third party directly infringed the plaintiff's copyright; (2) the defendant knew that the third party was directly infringing; and (3) the defendant materially contributed to or induced the infringement.

Secondary liability originated from the traditional agency relationships such as master-servant or employer-employee. Whereas the employee commits the direct infringement and the employer is held civilly liable for the wrongful act of their employee. For example, in *M. Witmark & Sons v. Calloway*, the employee committed the direct infringement by using copyrighted music for the player piano without the direction or knowledge of the owner or manager of the theater. The employer was held vicariously liable for copyright infringement by their employee. In this instance, the third party who committed the direct infringement is the employee.

The requirement that a defendant have the right to supervise or control is not limited to traditional agency relationships such as master-servant or employer-employee. Secondary liability for copyright infringement has been imposed on a person or entity even in the absence of an employer employee relationship. For example, in *Andrew Paul Leonard, d/b/a APL Microscopic vs. Stemtech International Inc*, Leonard proved direct infringement by Stemtech distributors and proved vicarious and contributory infringement by Stemtech.

In *M. Witmark & Sons v. Calloway et al*, No. 75. October 29, 1927, the District Court, E.D. Tennessee, N.D. stated regarding employer-employee third party liability:

Assuming that the defendant did not intend to infringe, the lack of intention does not affect the fact of liability. The result, and not the intention, determines the question of infringement. Lawrence v. Dana, Fed. Cas. No. 8136; Journal Pub. Co. v. Drake (C. C. A.) 199 F. 572; Reed v. Holliday (C. C.) 19 F. 325; Harper v. Shoppell (C. C.) 26 F. 519; Fishel v. Lueckel (C. C.) 53 F. 499; Stern v. Jerome H. Remick & Co. (C. C.) 175 F. 282. Neither does the fact, if it is a fact, that young Williams, the operator of the player piano, borrowed this music without the direction, knowledge, or consent of the owner or manager of the theater affect the question. The rule of the common law applies, to wit, that the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do, although the particular act may have been done without express authority from the master, or even against his orders.

McDonald v. Hearst (D. C.) 95 F. 657; *M. Witmark & Sons v. Pastime Amusement Co.* (D. C.) 298 F. 470.

In *ANDREW PAUL LEONARD, d/b/a APL Microscopic vs. STEMTECH INTERNATIONAL INC.*; Nos. 15-3198 & 15-3247; August 24, 2016, the Court stated regarding direct, contributory, and vicarious infringement:

*Contributory and vicarious infringement are theories of secondary liability for copyright infringement that “emerged from common law principles and are well established in the law.”*⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 and 930 (2005). “Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001). Thus, to prove a claim of contributory or vicarious infringement, a plaintiff must first show direct infringement by a third party.

Leonard proved direct infringement by Stemtech distributors. He demonstrated that he owned the copyrights to the infringed images, and that he did not authorize or license the use of his images in Stemtech’s advertising, marketing, and training materials. The materials containing his images ranged from webpages and PDFs to videos and a PowerPoint presentation promoting Stemtech products. This evidence provided a sufficient basis for a jury to reasonably conclude that the distributors directly infringed Leonard’s copyrights.

“One infringes contributorily by intentionally inducing or encouraging direct infringement.” *Grokster*, 545 U.S. at 930. To establish a claim of contributory infringement, a plaintiff must show: (1) a third party directly infringed the plaintiff’s copyright; (2) the defendant knew that the third party was directly infringing; and (3) the defendant materially contributed to or induced the infringement. See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”); see also *Perfect 10*, 508 F.3d at 1171 (explaining that, “under *Grokster*, an actor may be contributorily liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement”).

there was sufficient evidence from which a jury could conclude that third parties, namely Stemtech’s distributors, directly infringed Leonard’s copyrights. Furthermore, the evidence shows that Stemtech knew of the distributors’ infringing activity. Stemtech itself created the materials containing Leonard’s images, provided the materials to its distributors, and required the distributors to use the materials. Thus, Stemtech knew of its distributors’ infringing activities and plainly took “steps that [we]re substantially certain to result in such direct infringement.” *Perfect 10*, 508 F.3d at 1171-72.

Vicarious infringement occurs when one “profit[s] from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930. To establish vicarious infringement, a plaintiff must prove that the defendant had (1) the right and ability to supervise or control the infringing activity; and (2) a direct financial interest in such activities. *Grokster*, 545 U.S. at 930 & n.9; *Am. Tel. and Tel. Co. v. Winback and Conserve Program*, 42 F.3d 1421, 1441 (3d Cir. 1994) (reciting similar standard). The requirement that a defendant have the right to supervise or control is not limited to

traditional agency relationships such as master-servant or employer-employee. Indeed, vicarious infringement liability has been imposed on a person or entity “even in the absence of an employer employee relationship . . . if [the person or entity] has the right and ability to supervise the infringing activity.” Gershwin, 443 F.2d at 1162; Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963); see Napster, 239 F.3d at 1022 (affirming extension, in copyright context, of vicarious liability beyond employer-employee relationship); see also Winback and Conserve Program, 42 F.3d at 1441 (citing Gershwin and Shapiro, Bernstein). Nor does the control element require the existence of a formal contract between the defendant and the infringer. Rather, this element is satisfied where a “defendant’s ‘pervasive participation in the formation and direction’ of the direct infringer[’s]” activity supports a finding that “defendants were in a position to police the direct infringers.” Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262-63 (9th Cir. 1996) (defendant flea market operator had right to exclude vendors and “controlled and patrolled” the premises) (quoting Gershwin, 443 F.2d at 1163)); see Gershwin, 443 F.2d at 1163 (imposing vicarious liability even where defendant lacked contractual ability to control direct infringer); Shapiro, Bernstein, 316 F.2d at 306 (imposing vicarious liability where parties had licensing agreement).

In *Shapiro, Bernstein & Co., v. H.L. Green Company, Inc*, 315 F.2d 304 (1963), the United States Court of Appeals Second District stated regarding vicarious infringement:

For much the same reasons, the imposition of vicarious liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire Jalen; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised. Green's burden will not be unlike that quite commonly imposed upon publishers, printers, and vendors of copyrighted materials. See, 309 e. g., F.W. Woolworth Co. v Contemporary Co. v. Contemporary Arts., Inc., 344 U.S. 228, 73 S.Ct. 222, 97 L.Ed. 276 (1952); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 264 (2nd Cir. 1957); De Acosta v. Brown, 146 F.2d at 412; 93 U. of Pa.L.Rev. 459, 460 (1945).

In *Gershwin Publishing Corporation v. Columbia Artists Management, Inc*, 443 F.2d 1159, 1971, the U.S. Court of Appeals for the Second Circuit stated vicarious liability was initially predicated upon the agency doctrine of *respondent superior*, see, e. g., *M. Witmark & Sons v. Calloway*, 22 F.2d 412, 414 (E.D. Tenn. 1927), whereas an employer was held vicariously liable for the actions of their employee, that even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity. See also *Shapiro, Bernstein and Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). In *Shapiro*, the Court noted that the normal agency rule for vicarious infringement was of respondent superior imposes liability on an employer for copyright infringements by an employee.

In *Gershwin Publishing Corporation v. Columbia Artists Management, Inc*, 443 F.2d 1159, 1971, the U.S. Court of Appeals for the Second Circuit stated regarding vicarious infringement:

a person who has promoted or induced the infringing acts of the performer has been held jointly and severally liable as a "vicarious" infringer, even though he has no actual knowledge that copyright monopoly is being impaired

Although vicarious liability was initially predicated upon the agency doctrine of respondent superior, see, e. g., M. Witmark & Sons v. Calloway, 22 F.2d 412, 414 (E.D. Tenn. 1927), this court recently held that even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., supra; Comment, 64 Mich. L. Rev. 1172, 1175-78 (1966).

*Similarly, one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer. For example, in Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966), the district court held that an advertising agency which placed non-infringing advertisements for the sale of infringing records, a radio station which broadcast such advertisements and a packaging agent which shipped the infringing records could each be held liable as a "contributory" infringer if it were shown to have had knowledge, or reason to know, of the infringing nature of the records. Their potential liability was predicated upon "the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor. * * *" 256 F. Supp. at 403.*

The district court properly held CAMI liable as a "vicarious" and a "contributory" infringer. With knowledge that its artists included copyrighted compositions in their performances, CAMI created the Port Washington audience as a market for those artists. CAMI's pervasive participation in the formation and direction of this association and its programming of compositions presented amply support the district court's finding that it "caused this copyright infringement."

In *Fonovisa, Inc., v. Cherry Auction, Inc.* No. 94-15717, January 25, 1996, the United States Court of Appeals, Ninth District stated regarding vicarious infringement:

The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondent superior. The landmark case on vicarious liability for sales of counterfeit recordings is Shapiro, Bernstein and Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963). In Shapiro, the court was faced with a copyright infringement suit against the owner of a chain of department stores where a concessionaire was selling counterfeit recordings. Noting that the normal agency rule of respondent superior imposes liability on an employer for copyright infringements by an employee, the court endeavored to fashion a principle for enforcing copyrights against a defendant whose economic interests were intertwined with the direct infringer's, but who did not actually employ the direct infringer.

In *A.M Records Inc., v. Napstar, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) stated regarding contributory and vicarious infringement:

To prevail on a contributory or vicarious copyright infringement claim, a plaintiff must show direct infringement by a third party. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). As a threshold matter, plaintiffs in this action must demonstrate that Napster users are engaged in direct infringement.

Even in the absence of an employment relationship, a defendant incurs liability for vicarious copyright infringement if he "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." Fonovisa, 76 F.3d at 262 (quoting Gershwin, 443 F.2d at 1162).

Moreover, a defendant need not exercise its supervisory powers to be deemed capable of doing so. See Gershwin, 443 F.2d at 1161-63. The court therefore finds that Napster, Inc. has the right and ability to supervise its users' infringing conduct.

In *Metro-Goldwyn-Mayer Studios Inc., Et al., Petitioners v. Grokster. Ltd., et al.*, June 2005, the United States Supreme Court stated:

One infringes contributorily by intentionally inducing or encouraging direct infringement, see Gershwin Pub. Corp. v. Columbia Artists Management, Inc. , 443 F. 2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, Shapiro, Bernstein & Co. v. H. L. Green Co. , 316 F. 2d 304, 307 (CA2 1963). Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," Sony Corp. v. Universal City Studios, 464 U. S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, id., at 486 (Blackmun, J., dissenting); Kalem Co. v. Harper Brothers, 222 U. S. 55, 62-63 (1911); Gershwin Pub. Corp. v. Columbia Artists Management, supra, at 1162; 3 M. Nimmer & D. Nimmer, Copyright, §12.04[A] (2005).

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant who "not only expected but invoked [infringing use] by advertisement" was liable for infringement "on principles recognized in every part of the law." Kalem Co. v. Harper Brothers, 222 U. S., at 62-63 (copyright infringement). See also Henry v. A. B. Dick Co., 224 U. S., at 48-49 (contributory liability for patent infringement may be found where a good is most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. , 75 F. 1005, 1007-1008 (CA2 1896) (relying on advertisements and displays to find defendant's "willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement"); Rumford Chemical Works v. Hecker, 20 F. Cas. 1342, 1346 (No. 12,133) (CC N. J. 1876) (demonstrations of infringing activity along with "avowals of the [infringing] purpose and use for which it was made" supported liability for patent infringement). The rule on inducement of infringement as developed in the early cases is no different today. 11 Evidence of "active steps . . . taken to encourage direct infringement," Oak Industries, Inc. v. Zenith Electronics Corp., 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use, see, e.g., Water Technologies Corp. v. Calco, Ltd., 850 F. 2d 660, 668 (CA Fed. 1988) (liability for inducement where one "actively and knowingly aid[s] and abet[s]

another's direct infringement" (emphasis omitted)); Fromberg, Inc. v. Thornhill, 315 F.2d 407, 412-413 (CA5 1963).

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.

In *Perfect 10, Inc., v. Amazon*, No. 06-55405, 2007, the United States Court of Appeals for the 9th Circuit stated regarding vicarious infringement:

Two forms of third-party liability have been recognized in the case law: vicarious liability, derived from the similar concept in the law of employer-employee relations, and contributory infringement, derived from the tort concept of enterprise liability.

The nature of the copyrighted work. With respect to the second factor, "the nature of the copyrighted work," 17 U.S.C. § 107(2), our decision in Kelly is directly on point. There we held that the photographer's images were "creative in nature" and thus "closer to the core of intended copyright protection than are more fact-based works." Kelly, 336 F.3d at 820.

Supreme Court's recent interpretation of secondary liability, namely: "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." Grokster, 545 U.S. at 930."

Direct Infringement by Third Parties. As a threshold matter, before we examine Perfect 10's claims that Google is secondarily liable, Perfect 10 must establish that there has been direct infringement by third parties. See Napster, 239 F.3d at 1013 n.2 ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.").

Within the general rule that "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement," Grokster, 545 U.S. at 930, the Court has defined two categories of contributory liability: "Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court's opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of 'substantial' or 'commercially significant' noninfringing uses." Id. at 942 (Ginsburg, J., concurring) (quoting Sony, 464 U.S. at 442); see also id. at 936-37.

Grokster tells us that contribution to infringement must be intentional for liability to arise.

Grokster, 545 U.S. at 930. However, Grokster also directs us to analyze contributory liability in light of "rules of fault-based liability derived from the common law," id. at 934-35, and common law principles establish that intent may be imputed. "Tort law ordinarily imputes to an actor the intention to cause the natural and probable consequences of his conduct." DeVoto v. Pac. Fid. Life Ins. Co., 618 F.2d 1340, 1347 (9th Cir. 1980);

RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) (“If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”).

Therefore, under Grokster, an actor may be contributorily liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement.

Although neither Napster nor Netcom expressly required a finding of intent, those cases are consistent with Grokster because both decisions ruled that a service provider’s knowing failure to prevent infringing actions could be the basis for imposing contributory liability.

The actual damages calculated for vicarious and contributory infringement are calculated in the same manner as used for direct infringement under 17 U.S.C. § 504(b). Statutory damages are available under 17 U.S.C. § 504(c) for those infringed works that were timely filed under 17 U.S.C. § 412.

Why present multiple different claims in a Complaint on the same issue such as direct, vicarious, and contributory infringement on a copyright infringement? A Complaint advances theories and beliefs that the Plaintiff thinks their case is based upon. Sometimes in the beginning of a litigation, knowing which claim will be optimal and provide the best result can be difficult, especially given that the Plaintiff might not know all the facts and events at the time their Complaint is filed. These details might be learned through discoveries and depositions of the defendants and other witnesses. The Supreme Court has explained that a complaint need only “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Amending a Complaint at the beginning of a litigation per FRCP Rule 15 to cure issues presented by the defendants is permitted. It is also possible to amend the Complaint up to and including during the trial if for example learning of new facts that support the claim; normally requiring permission of the Court. Presenting different claims on the same general issue such as copyright infringement, such as: gives notice to the defendant; opens the scope of the litigation; and keeps the option open for that claim if the facts lead that way. This way at trial, the Plaintiff can choose their primary claim to advance that is supported by the facts. It is also possible that in the same Complaint, different claims are presented against different defendants. Have multiple theories might be more of a shotgun approach to a Complaint, but this also preserves the Plaintiff’s right to discover and present these as needed.

In the example presented, could the defendants be held liable under direct infringement in Count 1 and Vicarious Infringement in Count 2? More than likely defendant White would be liable for direct infringement under Count 1 and defendant XYZ123 would be liable under the vicarious infringement under Count 2. Whether XYZ123 could be held liable for the direct infringement might depend on their knowledge and interaction in the choice of using photographs without permission.

Example, Complaint, Section 7, “COUNT 2, VICARIOUS INFRINGEMENT.

78. Plaintiff incorporates herein by this reference each and every averment contained in paragraphs 1 through 77, inclusive.

79. Vicarious infringement by XYZ123 through the direct infringement of White.
80. The direct infringement committed by White pertains to the copying of Plaintiff's Photographs from the Second Edition to the derivative work, the Third Edition, resulting in the infringements of Plaintiff's copyrights.
81. In 2010, White told Plaintiff that that Plaintiff's Photographs would be removed from future editions of the *Expert Guide to Widgets*. In response, Plaintiff stated to White that any permission of Plaintiff's Photographs was terminated and not permitted in any future *Expert Guide to Widgets* edition after the Second Edition or any other books published by XYZ123. In an email in 2010, Plaintiff stated to White that for any future editions of *Expert Guide to Widgets*, no permission for Plaintiff's photographs is permitted without Plaintiff's CMI included with the Plaintiff's Photographs.
82. In 2010, White stated to Plaintiff that he ordered the removal of all names (CMI) from the photographs for the Second Edition for those individuals who contributed photographs as White considered them free advertisement. The act of removing CMI information is a violation of U.S.C. 1202(b)(1). The fact that White removed the CMI to increase profits through advertisements for XYZ123 goes toward willful intent with the objective of financial gain through infringement.
83. XYZ123 announced the next edition of *Expert Guide to Widgets* (Third Edition) in June of 2015. Plaintiff emailed White in June, 2015 and requested acknowledgement that either Plaintiff's Photographs were removed or that Plaintiff's CMI information was included with Plaintiff's Photographs. White responded to Plaintiff by through email and acknowledged Plaintiff's Photographs were removed from the Third Edition. From these emails, White was again aware in 2015 that Plaintiff's Photographs were not permitted to be used in the Third Edition unless the Plaintiff's CMI information was included with Plaintiff's Photographs and the usage of Plaintiff's Photographs in the Third Edition would be a violation of Plaintiff's copyrights.
84. As employer of White, XYZ123 had, and to continues to have, the right and ability to supervise and/or control the infringing activity of White and declined to exercise a right to stop or limit it. As the publisher of books, one of the core objectives and responsibilities of XYZ123 should be these books meet the basic criteria of the copyright laws. This should be especially true of those employed directly by XYZ123 to oversee these books.

85. Since speaking to White in 2015, no action was taken by XYZ123 to stop or limit the infringing activity. Plaintiff's Photographs are still in the Third Edition without Plaintiff's CMI with the Photographs and XYZ123 is still selling the Third Edition and receiving a benefit through these sales.
86. XYZ123 had, and still has, a direct financial interest and benefit in the infringing activities and profited from it through sales of the Third Edition and also through advertisements paid from individuals and organizations to be in the Third Edition.
87. Plaintiff is entitled to an award against XYZ123 based upon vicarious infringement of Plaintiff's Photographs.
88. As a direct and proximate result of XYZ123's infringements of Plaintiff's copyrights and exclusive rights under copyright laws, Plaintiff is also entitled to actual damages suffered as a result of the infringement and XYZ123's profits attributable to the infringement, pursuant to U.S.C. § code 504(b).
89. Alternatively, for Plaintiff's Photographs that were timely filed under 17 U.S.C. § 412, Plaintiff is entitled to maximum statutory damages pursuant to 17 U.S.C. § 504(c)(1) in the amount of \$30,000 for all infringements involved in the action, or such other amounts as may be proper under 17 U.S.C. § 504(c).
90. Plaintiff further is entitled to their attorney fees and full costs pursuant to 17 U.S.C. § 505.
91. Plaintiff is entitled to injunctive relief prohibiting further infringements of Plaintiff's copyrights pursuant to 17 U.S.C. § 502.
92. Plaintiff is entitled to the impounding and destruction of the infringing copies of the Third Edition pursuant to 17 U.S.C. § 503.

If White employed editors who copied the photographs from the Second Edition to the Third Edition, then the editors would have been the third party direct infringers and White and XYZ123 could have been liable under a vicarious infringement claim as they had the right and ability to supervise and/or control the infringing activity and had a direct financial interest and benefit in the infringing activities and profited from it through sales of the Third Edition

If third party editors copied the photographs from the Second Edition to the Third Edition, then White might have been liable under a Contributory infringement claim, especially given that White knew through emails and conversations that no permission was given for the Plaintiff's Photographs to be used in the Third Edition and White contributed to the Plaintiff's Photographs being in the Third Edition.

Digital Millennium Copyright Right Act of 1998

In 1998, Congress passed the Digital Millennium Copyright Act (“DMCA”). A portion of this Act pertains to the Copyright Management Information (CMI). The CMI is information that is included on or around the body of the photograph that normally identifies the copyright owner of the photograph. Including the CMI would help show that a photograph is protected and also would list the owner if someone is looking to borrow the photograph, they would know who to contact.

On the photograph includes watermarks or text that is on the body of the photograph. It is illegal to remove the CMI or modify it. A common example of a party removing the CMI would be to crop the photograph, removing the CMI. Someone might attempt to modify a CMI by adding a different mark over top of the CMI, perhaps attempting to claim the photograph is theirs or a third party. A CMI included around the body of the photograph is protected under the DMCA. The CMI does not include the general copyright notice at the bottom of the page in a book or web page. It is specifically included around the photograph to identify the owner.

Section 17 U.S.C. § 1202(a) prohibits knowing falsification of CMI with the intent to aid copyright infringement. Section 17 U.S.C. § 1202(b) prohibits the intentional removal or alteration of CMI with reasonable grounds to know the removal or alteration will aid infringement. It is illegal under the DMCA to remove or alter the CMI or prove a CMI that is false. It is also illegal to knowingly distribute a photograph with the CMI removed, altered, or false. Examples include:

1. A party who takes a photograph from a web page and removes the CMI on the photograph. The photograph without the CMI is used in a book. The party would be guilty of removing the CMI under 17 U.S.C. § 1202(b)(1), and distributing the photograph knowing the CMI was removed under 17 U.S.C. § 1202(b)(2).
2. A party purchases the rights to a book that have the CMI listed around the photographs, and the party orders the CMI removed for the subsequent edition of the book. The party would be liable for removing the CMI under 17 U.S.C. § 1202(b)(1) and distributing the photographs knowing that the CMI was removed under 17 U.S.C. § 1202(b)(2).
3. A party purchases the rights to a book knowing that the CMI was removed from the photographs. The party creates a new edition of the book with the infringing photographs and without the CMI. The party would be liable for distributing the photographs knowing that the CMI was removed under 17 U.S.C. § 1202(b)(2).
4. A web page has the CMI around the body of all photographs. A party takes one of the photos and uses in their book without the CMI around the photograph. The party would be liable for distributing the photographs knowing that the CMI was removed under 17 U.S.C. § 1202(b)(2).
5. A party who takes a photograph from a web page and removes the CMI on the photograph and places their own CMI on the photograph. The photograph with the false CMI is used in a book. The party would be liable for removing the CMI under 17 U.S.C. § 1202(b)(1), providing false CMI information under 17 U.S.C. § 1202(a)(1), and distributing the photographs knowing that the CMI was removed and false under 17 U.S.C. § 1202(b)(2) and 1202(a)(2).

6. A Photographer creates a photograph as a work for hire without any written instrument stating that they own any part of the copyright. The Photographer places their CMI on the photograph and uses it in a book. The Photographer would be liable for providing false CMI information under 17 U.S.C. § 1202(a)(1), and distributing the photographs knowing that the CMI was false under 17 U.S.C. § 1202(a)(2).

Under 17 U.S.C. § 1203(c), the copyright owner is entitled to the actual damages or statutory damages. The actual damages are similar to those on copyright infringement. They include the actual damages incurred plus any additional profits that are attributed through the violation. A party can elect to recover statutory damages instead of the actual damages at any time before the final judgment.

Under 17 U.S.C. § 1203(b), a court may order temporary or final injunctions on the impounding or destruction of all material that infringed on the owner's copyrights. The Court may also award costs and reasonable attorney fees to the prevailing party.

For statutory damages under 17 U.S.C. § 1203(c)(3), the complaining party may elect to recover for each violation of section 17 U.S.C. § 1201 in the sum of not less than \$200 or more than \$2,500 per act. For each violation of section 17 U.S.C. § 1202, a party may elect to recover for each violation in the sum of not less than \$2,500 or more than \$25,000.

It is important to remember that if the works were not timely registered with the Copyright Office, then you cannot seek statutory damages under 17 U.S.C. § 1203(c)(3).

Under 17 U.S.C. § 1203(c)(4), if a party violates 17 U.S.C. § 1201 or 1202 within 3 years after a final judgment, the Court may increase the amount of damages awarded up to triple the amount.

In *Schiffer Publishing Ltd., v. Chronicle Books, LLC*, No. 03-4962, November 12, 2004, the United States District Court for the Eastern District of Pennsylvania stated that the CMI being on or around the body of the photograph to be protected by the DMCA, the Court stated:

Section 1202 generally protects the integrity of copyright management information ("CMI"). CMI is information such as the title, name of author, and copyright owner, including the information set forth in a notice of copyright. 17 U.S.C. §1202(c)(1)-(3). Section 1202(a) prohibits knowing falsification of CMI with the intent to aid copyright infringement. Section 1202(b) prohibits the intentional removal or alteration of CMI with reasonable grounds to know the removal or alteration will aid infringement.

To recover for a violation of § 1202(a), a plaintiff must prove that the defendant who falsifies CMI knows that the CMI is false, and that the defendant provides, distributes, or imports the false CMI with the intent to aid infringement. 17 U.S.C. § 1202(a); see also S. REP.NO. 105-190, at 34-35 (1998); Ward v. Nat'l Geographic Soc'y, 208 F. Supp. 2d 429, 449 (S.D.N.Y. 2002). Plaintiffs in this case have not shown that Defendants possessed the requisite knowledge or intent to violate the relevant copyrights as required by § 1202(a).

To recover for a violation of § 1202(b), a plaintiff must demonstrate that the defendant intentionally removed or altered CMI knowing, or having reasonable grounds to know, that the removal will aid infringement. 17 U.S.C. § 1202(b).

*Next, this Court holds that Defendants did not remove CMI from Plaintiffs' photographs. To recover for a violation of § 1202(b), a plaintiff must demonstrate that the defendant intentionally removed or altered CMI knowing, or having reasonable grounds to know, that the removal will aid infringement. 17 U.S.C. § 1202(b). **In this case, the only copyright management information that Plaintiffs included with their work were notices of copyright that appeared on the inside covers of the Schiffer books. The individual photographs, which are the subjects of this action, did not contain any copyright management information whatsoever, either on or near the images themselves.** At least one court, when presented with a similar situation, held that the defendant had not "removed" copyright management information within the meaning of § 1202(b). See *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Ca. 1999) (holding that language and structure of statute commanded that § 1202 (b) "applies only to the removal of copyright management information on a plaintiff's product or original work"). Plaintiffs have not presented any authority to the contrary, and thus, this Court holds that, to be actionable under § 1202(b), a defendant **must remove copyright management information from the "body" of, or area around, plaintiff's work itself.** Therefore, Plaintiffs have failed to demonstrate that Defendants violated the DMCA here by not reproducing Plaintiffs' notices of copyright.*

In *Stephen Gordon v. Nextel Communications and Mullen Advertising, Inc.*, No. 01-2274, United States Court of Appeals, Sixth Circuit, October, 2003, the Court stated regarding 1202(b):

*Regardless of the defendants' actual knowledge of the removal or alteration of the copyright information, a party may be held vicariously liable for the actions of others under certain circumstance within the copyright context. Vicarious liability exists when (1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringement. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir.1963). These elements are independent requirements, and each must be present to render a defendant vicariously liable. See *id.* Lack of knowledge of the infringement is irrelevant. See *id.* Vicarious copyright liability is an "outgrowth" of the common law doctrine of respondeat superior, which holds the employer liable for the acts of its agents. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir.1996). However, vicarious liability extends beyond the traditional scope of the master-servant theory. See *Nimmer on Copyright*, § 12.04. As long as the required elements are present, a defendant may be liable, even in the absence of a traditional employer-employee relationship.*

*Regarding the alleged 1202(b)(3) violation, Gordon must prove that the defendants-or those for whom they are vicariously liable-possessed actual knowledge of the unauthorized change to the copyright management information, because the statute requires the defendant to act "knowing that copyright management information [had] been removed or altered without authority of the copyright owner or the law." 17 U.S.C. § 1202(b)(3). Accord *Nimmer*, § 12A.09[B][1][b]. According to the affidavit of Kevin McCarthy, Crossroads' art director, when Crossroads obtained the poster from the Cinema World, its personnel believed that the poster had been cleared for use in television commercials. The record contains no proof to contradict this assertion, nor evidence concerning Cinema World's conduct. As a result, there is no proof that the*

defendants-through Crossroads or Cinema World-utilized the version of the illustrations “knowing that copyright management information [had] been removed or altered without authority of the copyright owner.” 17 U.S.C. § 1202(b)(3). The defendants are entitled to summary judgment on the 1202(b)(3) claim.

A section 1202(b)(1) violation occurs when a person (i) without authority of the copyright owner or the law (ii) intentionally removes or alters any copyright management information (iii) knowing or having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of the federal copyright laws. Although Gordon failed to introduce evidence that Nextel or Mullen was aware of any infringement until they received the cease and desist letter from Gordon's counsel, he argues that because the copyright information is absent from the illustrations, Crossroads must have removed it, and that Nextel and Mullen are liable for Crossroads' actions.

Regarding statutory damages for DCMA infringement - *Chris Gregerson vs. Vilana Financial Inc.*, District Court of Minnesota, 2,15,2008 stated:

Plaintiff asserts that Defendants' willful removal of the digital and visible watermarks from his photos is a violation of 17 U.S.C. § 1202, thus entitling him to damages under 17 U.S.C. § 1203. 17 U.S.C. § 1202(b)(1), provides that “[n]o person shall, without the authority of the copyright owner or the law intentionally remove or alter any copyright management information.” 17 U.S.C. § 1202(c) defines copyright management information as “information conveyed in connection with copies . . . , including in digital form” and provides a list of such information including “the name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright,” § 1202(c)(3), and “identifying numbers or symbols referring to such information or links to such information,” § 1202(c)(7).

*The text of § 1202 defines copyright management information broadly and specifically includes information conveyed in digital form. Accordingly, while it is uncertain whether the visible watermark providing Plaintiff's website qualifies under § 1202(c)(7), Plaintiff's digitally embedded watermark does meet the definition set forth in § 1202(c)(3). The digitally embedded watermark, “(c) Chris Gregerson 2003” on the Skyline photo and “(c) Chris Gregerson 2002” on the Kenwood photo, includes Plaintiff's name and the notice of copyright. The plain text of § 1202(c)(3) unambiguously defines copyright management information to include protection for a digitally embedded watermark. However, even if the Court were to conclude that § 1202(c)'s definition of copyright management information was ambiguous and were to look to the legislative history and intent underlying § 1202(c), there is further support that a digitally embedded watermark constitutes copyright management information. In *IQ Group, Limited. v. Wiesner Publishing, LLC*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006), Judge Joseph A. Greenaway, Jr., of the United States District Court for the District of New Jersey, engages in a lengthy evaluation of legislative history and intent and concludes that “Congress viewed a digital watermark as an example of copyright management information.”*

Plaintiff may recover “statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.” The Court awards Plaintiff \$5,000 for Defendants' willful removal of the digitally embedded watermark in the Skyline photo.

Regarding statutory damages for DCMA - *Photo Resource Hawai'i, Inc vs. American Hawai'i travel Inc.*, District Court for the District of Hawaii stated

"Plaintiff has established that AHTI took the eight photographic works from a catalogue and removed or altered Plaintiff is entitled to statutory damages of at least \$2,500 per violation. ... Court finds that the Plaintiff's request for \$30,000 in statutory damages is reasonable."

Unlike statutory damages under 17 U.S.C. § 504(c)(2), whereas if the infringement is proved to be willful, the damages per infringement can be increased to \$150,000, there is no willful option under 17 U.S.C. § 1203(c)(3). The actual damages under 17 U.S.C. § 1203(c)(2) are calculated in the same manner as 17 U.S.C. § 504(b).

If the defendants committed both direct infringement and DMCA infringement, would the damages be duplicated? The defendant in this scenario removed the CMI, then used the copyrighted images without permission. The actual damages would more likely just be assessed once with the statutory damages more likely be cumulative.

Example, Complaint, Section 8, "COUNT 3, DISTRIBUTION OF PHOTOGRAPHS WITH COPYRIGHT MANAGEMENT INFORMATION REMOVED, 17 U.S.C. § 1202(b) and 1203, Violation of the Digital Millennium Rights Act

93. Plaintiff incorporates herein by this reference each and every averment contained in paragraphs 1 through 92, inclusive

94. Plaintiff is the legal owner of Plaintiff's Photographs. Per 17 U.S.C. § 1202(c)(2), the CMI includes the name of the author of the work.

95. Plaintiff Photographs were published in the First Edition with Plaintiff's CMI information included with Plaintiff's Photographs "*photos courtesy of Kevin Flynn*". This identifies the Plaintiff as the legal copyright owner of the photographs.

96. Defendants published and distributed the Third Edition with Plaintiff's CMI information removed from around Plaintiff's Photographs.

97. Defendants possessed actual knowledge of Plaintiff's CMI information being removed. In 2010, White stated to Plaintiff that White had ordered the removal of all names that were included with the photographs in *Expert Guide to Widgets* as he considered them free advertisements. This included the Plaintiff's name (CMI) around the Plaintiff's Photographs identifying the Plaintiff as the owner of the Photographs. This also included other individuals and organizations whose photographs were used in *Expert Guide to Widgets*. As White ordered the CMI removal, he had actual knowledge that the CMI

information was removed. In addition, Plaintiff told White several times through email and verbally that Plaintiff's Photographs were not permitted in future editions of *Expert Guide to Widgets* without Plaintiff's CMI information included with Plaintiff's Photographs. Therefore, Defendants had actual knowledge that Plaintiff had stated that his CMI information was removed and that his Photographs were not authorized in the Third Edition without the CMI information.

98. In June 2015, when the Third Edition was announced, Plaintiff wrote White to verify that Plaintiff's Photographs were removed or that Plaintiff's CMI information was with his Photographs. White responded confirming that the Plaintiff's Photographs were removed from the Third Edition, even though Plaintiff's Photographs were included without Plaintiff's CMI. This goes toward Defendant's actual knowledge of the removed CMI, that the Plaintiff did not authorize the CMI removal from his Photographs and goes towards Defendant's willful and wanton behavior.
99. Plaintiff stated to Defendants several times through email and verbally that Plaintiff's Photographs were not authorized in future editions of *Expert Guide to Widgets* without Plaintiff's CMI included with Plaintiff's Photographs. This was specifically stated in June 2015 regarding the Third Edition. As Plaintiff did not authorize Plaintiff's Photographs to be used without Plaintiff's CMI, then there was not authorization of the copyright owner of the Photographs to be used in the Third Edition without Plaintiff's CMI information.
100. Defendants knowingly published and distributed the Third Edition with Plaintiff's CMI removed in violation to 17 U.S.C. § 1202(b)(3).
101. Plaintiff is entitled to an award under 17 U.S.C. § 1203(b)(3) of actual damages per 17 U.S.C. § 1203(c)(2). In the alternative, for Plaintiff's Photographs that were timely filed per 17 U.S.C. § 412, Plaintiff is entitled to statutory damages per 17 U.S.C. § 1203(c)(3)(B) in the sum of not less than \$2,500 or more than \$25,000 for each violation.
102. Plaintiff is entitled per 17 U.S.C. § 1203(B)(2) to have all material deemed infringing to be impounded and per 17 U.S.C. § 1203(B)(6) destroyed.
103. Plaintiff is entitled to attorney fees and costs per 17 U.S.C. § 1203(b)(5) and 1203(b)(4).

STANDARD OF REVIEW FOR A MOTION TO DISMISS

Your Complaint should provide the sufficient factual allegations to show that you are entitled to relief. The Defendants, before filing their Response, can challenge your Complaint through Federal Rules of Civil Procedure (“FRCP”) Rule 12(b) Motion to Dismiss, which could include claims such as: lack of subject-matter jurisdiction; lack of personal jurisdiction; improper venue; insufficient process; insufficient service of process; failure to state a claim upon which relief can be granted; and failure to join a party under Rule 19. If there are problems or your Complaint can be improved or made clearer on an issue, you can timely file an Amended Complaint to cure any deficiencies per FRCP Rule 15.

The general guidelines for a Complaint are found under FRCP Rule 8. For example, a Complaint should contain “*a short and plain statement of the claim showing that the pleader is entitled to relief,*” and *each allegation must be simple, concise, and direct.*” The Complaint will provide a defendant fair notice of what the claim is and the grounds upon which it rests. In most cases, it would be difficult for a Plaintiff to state in their Complaint all of the necessary facts to support their claims, especially given that they will probably learn of all of the essential facts through discovery and depositions of the defendants and other sources.

To survive a motion to dismiss, a plaintiff must set forth factual allegations sufficient plausibly to allege each element of the alleged cause of action, see *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These factual allegations must be enough to raise a right to relief above the speculative level, see *Bell Atlantic Corp. et al. v. Twombly*, 550 U.S. 544, 555-56 (2007). The allegations required to support a claim for copyright infringement are (1) ownership of a valid copyright, and (2) that the defendant copied constituent elements of the work that are original to the plaintiff, see *Feist Publ’ns*, 499 U.S. at 361. The Complaint must set forth the factual allegations for these elements to raise the right to relief for the copyright infringement claim.

In a copyright infringement litigation, the first essential element is to show ownership of a valid copyright. Including the copyright registration as part of the Complaint provides an important factual assertion to the Complaint; that the Plaintiff owns the copyrights and has the right to relief therefore for the infringement. As seen in *Art Rogers v. Jenn Koon*, Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540, 1992, “*The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights prima facie evidence of the valid ownership of a copyright*”. If the work(s) are not registered with the copyright office before the litigation is filed, a Complaint might be dismissed, see 17 U.S.C. § 411(a), therefore the Plaintiff should have this certification available to be able to include.

There are two parts of the second element of a copyright infringement claim: 1. there are parts of the work that are original to the plaintiff; 2. that the defendant copied them. Original pertains to the creative elements added to the work by the Plaintiff that form the basis of the copyright of the work. For photographic works, this can include choices of the camera, film, lighting, shading, lens, focus, angle, perspective, and posing of the subject to name a few or even the timing of the photograph. In the Analysis of Artistic Judgment in Taking Photographs section of this book, the author outlines in extreme detail the judgment and choices he uses in the taking of coin photographs. In a copyright infringement Complaint, the creative choices in making a work copyrightable should be concise statements summarizing this element of the claim. The details

of the incremental contributions can be produced during the discovery and deposition phase of the litigation, which might include a visual presentation of the choices made and results produced. The facts alleging the defendants copied the works should be concise statements alleging how the defendants infringed upon the plaintiff's works.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002), the United States Supreme Court stated regarding the objective of the Complaint:

Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

In *Bell Atlantic Corp. et al. v. Twombly et al.* No 05-1126 (2007), the United States Supreme Court stated regarding what

1. Stating a §1 claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 6–17.

*(b) This case presents the antecedent question of what a plaintiff must plead in order to state a §1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” Conley v. Gibson, 335 U.S. 41, 47. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff's obligation to provide the “grounds” of his “entitlement to relief” requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. **Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.** Applying these general standards to a §1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects **Rule 8(a)(2)'s threshold requirement that the “plain statement” possess enough heft to “show that the pleader is entitled to relief.”** A parallel conduct allegation gets the §1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility.*

In *Ashcroft v. Iqbal*, No. 07-1015, 2009, the United States Supreme Court stated regarding a Complaint:

*Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” “Detailed factual allegations” are not required, Twombly, 550 U. S., at 555, but the Rule does call for sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face,” *id.*, at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. Two working principles underlie Twombly. First, the*

tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Id., at 555. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. Id., at 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

The Federal Rules represent a “notice pleading” standard and require only a concise statement of the claim, rather than evidentiary facts that would suffer for ‘lack of detail.’ Liberal discovery rules and summary judgment motions can be used to filter dispose of unmeritorious claims. If the information sought through a Motion to Dismiss is obtainable through discovery, the motion should be denied. *See, e.g., Towers Tenant Ass’n v. Towers Ltd. P’ship*, 563 F. Supp. 566, 569 (D.D.C. 1983) (denying motion for a more definite statement because details such as “dates, times, names and places” are “the central object of discovery, and need not be pleaded”).

In a FRCP Rule 12(b) Motion to Dismiss, all allegations in the complaint must be accepted as true and all inferences drawn in Plaintiffs’ favor, *see Allaire Corp.*, 433 F.3d at 249-250; *Caiola v. Citibank, N.A.*, 295 F.3d 312, 321 (2d Cir. 2002). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the Plaintiff. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). A complaint will survive a motion under Fed. R. Civ. P. 12(b)(6) if it states plausible grounds for Ochre's entitlement to the relief sought, *id.* at 1965-66, i.e., it needs merely contain sufficient factual allegations to raise a right to relief above the speculative level, *id.* At 1965. The issue before the Court upon consideration of such a motion is not whether Ochre "will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 839 F. Supp. 2d 562, 565 (E.D.N.Y. 2012) (citing to *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir.2001)).

Once an Amended Complaint is filed, the original Complaint is rendered no legal effect. *See West Run Student Housing Associates, LLC; View JMU, LLC; Mt. Tabor Villiage, LLC v. Huntington National Bank*, No 12-2430, Decided April 4, 2013, the United States Court of Appeals, Third District stated:

“The amended complaint ‘supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading.’ “ New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1504 (3d Cir.1996). *This approach “ensures that a particular claim will be decided on the merits rather than on technicalities.” Dole v. Arco Chem. Co. .*, 921 F.2d 484, 487 (3d Cir.1990); *see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1474 (3d ed. 2008) (“A liberal policy toward allowing amendments to correct errors in the pleadings clearly is desirable and furthers one of the basic objectives of the federal rules—the determination of cases on their merits.”).*

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A Motion for Summary Judgment is a means for a party asserting or defending against a claim may request the Court to affirm or dismiss all or part of the claim before trial. The moving party filing the Summary Judgment motion must show that there is no genuine dispute as to any material fact to essential elements of a claim and that the moving party is entitled to a judgment on the claim as a matter of law (FRCP 56(a)).

A Motion for Summary Judgment can be filed at any time up to 30 days after the close of discovery or by order of a Court (FRCP 56(b)). The United States Supreme Court stated in *Celotex Corporation v. Myrtle Nell Cartrett*, No. 85-198, 1986, that there first should be adequate time for discovery before the entry of Summary Judgment. If one party files a Summary Judgment motion, the opposing party can request the Court to permit time for additional discovery before the motion is heard per FRCP Rule 56(d).

The moving party can cite the materials in the record that they believe there is no genuine dispute that are relevant and essential elements to the claim. This may include depositions, documents, electronically stored information, affidavits, stipulations, admissions, interrogatory answers, or other materials. The nonmoving party can enter material from the record that they believe show that there is a dispute to material facts that are critical to the claim and require a trial to resolve. Either party can include an affidavit to provide additional information based upon their knowledge (FRCP 56(c)).

For example, let's say in a copyright litigation that the defendant moved for a Summary Judgment on the Plaintiff's claim of statutory damages. The Defendant shows in the record that the Plaintiff did not timely file his works with the Copyright Office per 17 U.S.C. § 412. If the material facts are undisputed, the Court would rule in favor of the Defendant based upon the law. This is an example of a partial Summary Judgment. In another scenario, the Defendant moves for Summary Judgment based upon the undisputed facts established in the record that the Plaintiff used slavish copies for their copyrighted works, such as works created through taking a photograph of someone else's photograph. As the Plaintiff's works have no original creative choices used in their creation, they would not be copyrightable, therefore the Court would dismiss the copyright claim. What if the Defendant demonstrates that he took a photograph of the same subject at almost the exact same time as the Plaintiff, creating his own work and not copying the work of the Plaintiff? This again would refute an essential element of the copyright infringement claim and therefore require the claim be dismissed.

On the other side of the coin so to speak, let's say the Plaintiff owns a valid copyright to their work, shows the original copyrightable aspect of their work, and provides direct evidence of the Defendant copying those original aspects of their work. If such material facts are undisputed, then the Plaintiff can seek Summary Judgment on their copyright claim with the Court judgment as a matter of law that the Defendant infringed upon the Plaintiff's copyrights. The amount of damages for the copyright infringement would then normally be left to be determined at trial.

What if the Plaintiff moved for a partial Summary Judgment based upon the record that the Defendant's infringement of the Plaintiff's copyrights was willful and therefore statutory damages under 17 U.S.C. § 504(c)(2) were applicable. The Defendant responds with an affidavit

asserting that his infringement was not willful. The Court would need to deny the Summary Judgment motion and permit a bench trial or jury to make a credibility determination on this issue.

In a Motion for Summary Judgment, the evidence must be viewed in the light most favorable to the non-moving party, and the Court must not make credibility findings. Direct testimony of the non-movant must be believed, however implausible. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1159 (9th Cir. 1999). The Court is not required to adopt unreasonable inferences from circumstantial evidence. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). The moving party bears the initial burden of demonstrating the absence of a genuine dispute as to material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001)(en banc). To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir.2000).

The burden then shifts to the non-moving party to produce evidence sufficient to support a jury verdict in their favor. *Devereaux*, 263 F.3d at 1076. The non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine dispute of material fact exists. *Celotex*, 477 U.S. at 324. Only admissible evidence may be considered in ruling on a motion for summary judgment. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002); see also Fed.R.Civ.P. 56(e). In determining admissibility for summary judgment purposes, it is the contents of the evidence rather than its form that must be considered. *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003).

In *Celotex Corporation v. Myrtle Nell Cartrett*, No. 85-198, 1986, the United States Supreme Court stated regarding Summary Judgement that

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 322-326.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322-323.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the

moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. Adickes v. S.H. Kress & Co., supra, explained. Pp. 323-326.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). Pp. 326.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), No. 84-1602, the United States Supreme Court stated:

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and judge determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Pp. 477 U.S. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the New York Times "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 477 U.S. 252-256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor, and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 477 U.S. 256-257.

In *Scentsy, Inc., v. Chase, LLC et al*, Case 1:11-CV-00249-BLW, 2013, The United States District Court for the District of Idaho stated regarding copyright claims in a Summary Judgment motion that that:

To prevail on a copyright infringement claim, a plaintiff "must demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Benay v. Warner Bros. Entertainment, Inc., 607 F.3d 620, 624 (9th Cir. 2010)

B. Direct Evidence of Copying. *The Court now turns to the issue of infringement. In most infringement suits, answering the question of whether copying has occurred requires a comparison of plaintiff's work with the allegedly infringing work to determine whether they are "substantially similar" or "virtually identical," depending on the scope of the plaintiff's copyright. Mattel, Inc. v MGA Entm't, Inc., 616 F.3d 904, 913-14 (9th Cir. 2010). This test will be discussed in more detail below.*

In a limited set of infringement cases, however, it is unnecessary to make any comparison because the plaintiff has direct evidence that the defendant infringed the plaintiff's copyright. *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989); see also *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012). But “a finding that a defendant copied a plaintiff's work, without application of a substantial similarity analysis, has been made only when the **defendant has engaged in virtual duplication of a plaintiff's entire work.**” *Narell*, 872 F.2d at 910. In such cases, “a substantial similarity analysis is unnecessary because the copying of the substance of the entire work is admitted.” *Id.*

C. Indirect Evidence of Copying

Ninth Circuit precedent on how the Court should address indirect evidence of copying is somewhat disjointed. Some cases indicate that “absent evidence of direct copying, proof of infringement involves **fact-based showings that the defendant had ‘access’ to the plaintiff's work and that the two works are ‘substantially similar.’**” *Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006). (Internal quotation and citation omitted). See also *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990). According to *Funky Films*, “the substantial-similarity test contains an extrinsic and intrinsic component.” *Id.* at 1077. **At the summary judgment stage, “courts apply only the extrinsic test; the intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury.”** *Id.* at 1077; see also *Benay*, 607 F.3d at 624.

Accordingly, the Court now turns to the extrinsic stage of the two-part test.

1 (1) Extrinsic Component - The “extrinsic” component of the test asks whether the two works' objective aspects are similar. *Apple Computer, Inc., v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). Because copyright exists only in an author's creative expression, it is proper to consider only those protected elements of Scentsy's registered warmers at this stage of the inquiry. *Id.* at 1443.

Once the copyrightable elements are identified, the Court must determine the scope of the protection afforded to them. *Apple*, 35 F.3d at 1443.

Still, the Court must filter out any unprotectable elements when applying the substantially similar standard. *Mattel*, 616 F.3d at 915.

(2) Intrinsic Component

As explained above, **the standard for infringement determined at the extrinsic stage—substantially similar in this case—is applied at the intrinsic stage.** *Id.* at 914. At the intrinsic stage, **we ask whether an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar.** *Id.* Although this question is often left to the jury, and the Ninth Circuit has made clear that summary judgment on the substantial similarity issue in copyright cases is not highly favored, it has “frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.” *Funky Films*, 462 F.3d at 1076-77. On this issue, Ninth Circuit case law is again somewhat disjointed, with cases like *Funky Films* indicating that the intrinsic test is left to a jury, but that a district court may grant summary judgment if a plaintiff cannot satisfy the extrinsic test. *Id.* at 1077. But *Funky Films* did not apply the extrinsic/intrinsic test in the same manner as *Mattel* applied it – by determining the degree of protection during the extrinsic test and applying it during the intrinsic test. In *Mattel*, the circuit

indicated that most often the intrinsic test is a question for the jury, but it did not preclude summary judgment. Mattel, 616 F.3d at 914.

In this case, the Court concludes that no jury could conclude that an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar.

Accordingly, the Court concludes that no reasonable jury could conclude that Harmony's challenged warmers are substantially similar to Scentsy's Sendai, Boleyn, Snow Day, or Kokopelli warmers. Therefore, the Court will grant Harmony summary judgment on Scentsy's copyright infringement claim.

Appendix A – United States Statutes And Federal Rules of Civil Procedure

17 U.S.C. § 101 Ownership of copyright as distinct from ownership of material object

As define under Title 17, section §§ 101, general and photographic ‘works’ include the following:

An “anonymous work” is a work on the copies or phonorecords of which no natural person is identified as author.

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.³

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The “best edition” of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps,

globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 102 Subject matter of copyright, in general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 103 Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilations or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 104(a) Copyright in restored works

(a) Automatic Protection and Term.—

(1) Term.—

(A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.

(B) Any work in which copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

17 U.S.C. § 106 Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 107 Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 201 Ownership of copyright

(a) Initial Ownership.—

Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works Made for Hire.—

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.—

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.—

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 U.S.C. § 202 Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 204 Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if—

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

17 U.S.C. § 302 Duration of copyright: Works created on or after January 1, 1978

(a) In General.—

Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works.—

In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, and Works Made for Hire.—

In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

18 U.S.C. § 408 Copyright registration in general

(a) Registration Permissive.—

At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(f) Preregistration of Works Being Prepared for Commercial Distribution.—

(1) Rulemaking.—

Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

(2) Class of works.—

The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

(3) Application for registration.—Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office—

(A) an application for registration of the work;

(B) a deposit; and

(C) the applicable fee.

(4) Effect of untimely application.—An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of—

(A) 3 months after the first publication of the work; or

(B) 1 month after the copyright owner has learned of the infringement.

17 U.S.C. § 410 Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

17 U.S.C. § 411 Registration and civil infringement actions

(a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b)

(1) A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless—

(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and

(B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.

(2) In any case in which inaccurate information described under paragraph (1) is alleged, the court shall request the Register of Copyrights to advise the court whether the inaccurate information, if known, would have caused the Register of Copyrights to refuse registration.

(3) Nothing in this subsection shall affect any rights, obligations, or requirements of a person related to information contained in a registration certificate, except for the institution of and remedies in infringement actions under this section and section 412.

(c) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 505 and section 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than 48 hours before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

17 U.S.C. § 412 Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a), an action for infringement of the copyright of a work that has been preregistered under section 408(f) before the commencement of the infringement and that has an effective date of registration not later than the earlier of 3

months after the first publication of the work or 1 month after the copyright owner has learned of the infringement, or an action instituted under section 411(c), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 501 Infringement of Copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

17 U.S.C. § 502 Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

17 U.S.C. § 503 Remedies for infringement: Impounding and disposition of infringing articles

(a)

(1) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable—

(A) of all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner;

(B) of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and

(C) of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under this subparagraph shall be taken into the custody of the court.

(2) For impoundments of records ordered under paragraph (1)(C), the court shall enter an appropriate protective order with respect to discovery and use of any records or information that has been impounded. The protective order shall provide for appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in such records is not improperly disclosed or used.

(3) The relevant provisions of paragraphs (2) through (11) of section 34(d) of the Trademark Act (15 U.S.C. 1116(d)(2) through (11)) shall extend to any impoundment of records ordered under paragraph (1)(C) that is based upon an ex parte application, notwithstanding the provisions of rule 65 of the Federal Rules of Civil Procedure. Any references in paragraphs (2) through (11) of section 34(d) of the Trademark Act to section 32 of such Act shall be read as references to section 501 of this title, and references to use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services shall be read as references to infringement of a copyright.

(b)

As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 504 Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the

actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3)

(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) Additional Damages in Certain Cases.—

In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

17 U.S.C. § 505 Remedies for infringement: Cost and attorney fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 507 Limitations of actions

(a) Criminal Proceedings.—

Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.

(b) Civil Actions.—

No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

17 U.S.C. § 1201 Circumvention of copyright protection systems

(a) Violations Regarding Circumvention of Technological Measures.—

(1)

(A) No person shall circumventing a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the

Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

(A) to “circumventing a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove,

deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure “circumventing a technological measure” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional Violations.—

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection—

(A) to “circumventing protection afforded by a technological measure” means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure “effectively protects a right of a copyright owner under this title” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

17 U.S.C. § 1202 Integrity of Copyright Management Information

(a) False Copyright Management Information.—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) Removal or Alteration of Copyright Management Information.—No person shall, without the authority of the copyright owner or the law—

(1) intentionally remove or alter any copyright management information ,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) Definition.—As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

17 U.S.C. § 1203 Civil Remedies

(a) Civil Actions.—

Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) Powers of the Court.—In an action brought under subsection (a), the court—

- (1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;
 - (2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;
 - (3) may award damages under subsection (c);
 - (4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;
 - (5) in its discretion may award reasonable attorney’s fees to the prevailing party;
- and

(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) Award of Damages.—

(1) In general.—Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 is liable for either—

(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or

(B) statutory damages, as provided in paragraph (3).

(2) Actual damages.—

The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) Statutory damages.—

(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.

(4) Repeated violations.—

In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within 3 years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

28 U.S.C. § 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 Diversity of Citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a States and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an

action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a), as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this code—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1338 – Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term “State” includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17 and to exclusive rights in designs under chapter 13 of title 17 to the same extent as such subsections apply to copyrights.

28 U.S.C. § 1391 – Venue generally.

(a) APPLICABILITY OF SECTION.—Except as otherwise provided by law—

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) VENUE IN GENERAL.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) RESIDENCY.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS.—

For purposes of venue under this chapter, in a State which has more than one and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1400 – Patents and copyrights, mask, works, and designs.

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. § 1404 – Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district court. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

28 U.S.C. § 1406 – Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue,

Federal Rules of Civil Procedure (FRCP)

FRCP Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

FRCP Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

- (i) within 21 days after being served with the summons and complaint; or
- (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) **HOW TO PRESENT DEFENSES.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRCP Rule 15. Amended and Supplemental Pleadings

(a) **AMENDMENTS BEFORE TRIAL.**

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) AMENDMENTS DURING AND AFTER TRIAL.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) RELATION BACK OF AMENDMENTS.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or

defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

FRCP Rule 56. Summary Judgment

(a) **MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **TIME TO FILE A MOTION.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **PROCEDURES.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) **FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

- (4) issue any other appropriate order.
- (f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:
 - (1) grant summary judgment for a nonmovant;
 - (2) grant the motion on grounds not raised by a party; or
 - (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.
- (g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.
- (h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney’s fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Appendix B – Copyright Acts

Copyright Act of 1790

1 Statutes At Large, 124

An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passing of this act, the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns, who halt or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons, being a citizen or citizens of these United States, or residents therein, his or their executors, administrators or assigns, who halt or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years; Provided, He or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

Sec. 2 And be it further enacted, That if any other person or persons, from and after the recording the title of any map, chart, book or books, and publishing the same as aforesaid, and within the times limited and granted by this act, shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold or exposed to sale, any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid, then such offender or offenders shall forfeit all and every sheet and sheets, being part of the same, or either of them, to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same: And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to the author or proprietor of such map, chart, book or books, who shall sue for the same,

and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable. Provided always, That such action be commenced within one year after the cause of action shall arise, and not afterwards.

Sec. 3 And be it further enacted, That no person shall be entitled to the benefit of this act, in cases where any map, chart, book or books, hath or have been already printed and published, unless he shall first deposit, and in all other cases, unless he shall before publication deposit a printed copy of the title of such map. chart, book or books, in the clerk's office of the district court where the author or proprietor shall reside: And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose, in the words following, (giving a copy thereof to the said author or proprietor, under the seal of the court, if he shall require the same).”District of to wit: Be it remembered, that on the day of in the year of the independence of the United States of America, A. B. of the said district, hath deposited in this office the title of a map, chart, book or books, (as the case maybe) the right whereof he claims as author or proprietor. (as the case may be) in the words following to wit: [here insert the title] in conformity to the act of the Congress of the United States, intituled ‘ An act for the encouragement of learning, by securing the copies of maps, chart, and book, to the authors and proprietors of such copies, during the time therein mentioned.’ C. D. clerk of the district of .” For which the said clerk shall be entitled to receive sixty cents from the said author or proprietor, and sixty cents for every copy under seal actually given to such author or proprietor as aforesaid. And such author or proprietor shall, within two months from the date thereof cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

Sec. 4 And be it further enacted, That the author or proprietor of any such map, chart, book or books, shall, within six months after the publishing thereof, deliver, or cause to be delivered to the Secretary of State a copy of the same, to be preserved

Sec. 5. And be it further enacted, That nothing in this act shall be construed to extend to prohibit the importation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

Sec. 6 And be it further enacted, That any person or persons who shall print or publish and manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.

Sec. 7 And be it further enacted, That if any person or persons shall be sued or prosecuted for any matter, act or thing done under or by virtue of this act, he or they may plead the general issue, and give the special matter in evidence.

Copyright Act of February 3, 1831

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed,

and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, map, chart, musical composition, print, cut, or engraving, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

Sec. 2. *And be it further enacted*, That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children for the further term of fourteen years: *Provided*, That the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights, be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.

Sec. 3. *And be it further enacted*, That in all cases of renewal of copyright under this act, such author or proprietor shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

Sec. 4. *And be it further enacted*, That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book, or books, map, chart, musical composition, print, cut, or engraving, in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and the clerk of such court is hereby directed and required to record the same thereof forthwith, in a book to be kept for that purpose, in the words following (giving a copy of the title, under the seal of the court, to the said author or proprietor, whenever he shall require the same:) "District of _____ to wit: Be it remembered, that on the _____ day of _____ anno Domini, _____ A. B., of the said district, hath deposited in this office the title of a book, (map, chart, or otherwise, as the case may be,) the title of which is in the words following, to wit: (here insert the title;) the right whereof he claims as author (or proprietor as the case may be;) in conformity with an act of Congress, entitled 'An act to amend the several acts respecting copyrights.' C. D., clerk of the district." For which record, the clerk shall be entitled to receive, from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy, under seal, actually given to such person or his assigns. And the author or proprietor of any such book, map, chart, musical composition, print, cut, or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver or cause to be delivered a copy of the same to the clerk of said district. And it shall be the duty of the clerk of each district court, at least once in every year, to transmit a certified list of all such records of copyright, including the titles so recorded, and the dates of record, and also all the several copies of books or other works deposited in his office according to this act, to the Secretary of State, to be preserved in his office.

Copyright Act of March 3, 1865

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That the provisions of said act shall extend to include photographs and negatives thereof which shall hereafter be made, and shall ensure to the benefit of the authors of the same in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings.

Sec. 2. And be it further enacted, That a printed copy of every book, pamphlet, map, chart, musical composition, print, engraving, or photograph, for which a copyright shall be secured under said acts, shall be transmitted free of postage or other expense by the author or proprietor thereof, within one month of the date of publication to the library of congress at Washington for the use of said library; and the librarian of congress is hereby required to give a receipt in writing of the same.

Appendix C – Copyright Office

Copyright information from the U.S. Copyright Office web site. The following presents common questions and important responses from the Copyright Office: <https://www.copyright.gov/help/faq/faq-general.html>

The following is from the Copyright in General section

What is copyright?

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works.

What does copyright protect?

Copyright, a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed. See Circular 1, *Copyright Basics*, section “What Works Are Protected.”

How is a copyright different from a patent or a trademark?

Copyright protects original works of authorship, while a patent protects inventions or discoveries. Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be. A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.

When is my work protected?

Your work is under copyright protection the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device.

Do I have to register with your office to be protected?

No. In general, registration is voluntary. Copyright exists from the moment the work is created. You will have to register, however, if you wish to bring a lawsuit for infringement of a U.S. work. See Circular 1, *Copyright Basics*, section “Copyright Registration.”

Why should I register my work if copyright protection is automatic?

Registration is recommended for a number of reasons. Many choose to register their works because they wish to have the facts of their copyright on the public record and have a certificate of registration. Registered works may be eligible for statutory damages and attorney's fees in successful litigation. Finally, if registration occurs within five years of publication, it is considered *prima facie* evidence in a court of law. See Circular 1, *Copyright Basics*, section “Copyright Registration” and Circular 38b, *Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA)*, on non-U.S. works.

I’ve heard about a “poor man’s copyright.” What is it?

The practice of sending a copy of your own work to yourself is sometimes called a “poor man’s copyright.” There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration.

Is my copyright good in other countries?

The United States has copyright relations with most countries throughout the world, and as a result of these agreements, we honor each other's citizens' copyrights. However, the United States does not have such copyright relationships with every country. For a listing of countries and the nature of their copyright relations with the United States, see Circular 38a, *International Copyright Relations of the United States*.

The following is from the Copyright in General section

Who is an author?

Under the copyright law, the creator of the original expression in a work is its author. The author is also the owner of copyright unless there is a written agreement by which the author assigns the copyright to another person or entity, such as a publisher. In cases of works made for hire, the employer or commissioning party is considered to be the author. See Circular 30, *Works Made for Hire*.

What is a deposit?

A deposit is usually one copy (if unpublished) or two copies (if published) of the work to be registered for copyright. In certain cases such as works of the visual arts, identifying material such as a photograph may be used instead. See Circular 40a, *Deposit Requirements for Registration of Claims to Copyright in Visual Arts Material*. The deposit is sent with the application and fee and becomes the property of the Library of Congress.

What is publication?

Publication has a technical meaning in copyright law. According to the statute, “Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication.” Generally, publication occurs on the date on which copies of the work are first made available to the public. For further information see Circular 1, *Copyright Basics*, section “Publication”.

What is a copyright notice? How do I put a copyright notice on my work?

A copyright notice is an identifier placed on copies of the work to inform the world of copyright ownership. The copyright notice generally consists of the symbol or word “copyright (or copr.),” the name of the copyright owner, and the year of first publication, e.g., ©2008 John Doe. While use of a copyright notice was once required as a condition of copyright protection, it is now optional. Use of the notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office. See Circular 3, *Copyright*

Notice, for requirements for works published before March 1, 1989, and for more information on the form and position of the copyright notice.

What is copyright infringement?

As a general matter, copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.

Where is the public domain?

The public domain is not a place. A work of authorship is in the “public domain” if it is no longer under copyright protection or if it failed to meet the requirements for copyright protection. Works in the public domain may be used freely without the permission of the former copyright owner.

What is mandatory deposit?

Copies of all works under copyright protection that have been published in the United States are required to be deposited with the Copyright Office within three months of the date of first publication. See Circular 7d, *Mandatory Deposit of Copies or Phonorecords for the Library of Congress*, and the Deposit Regulation 202.19.

What is a work made for hire?

Although the general rule is that the person who creates the work is its author, there is an exception to that principle. The exception is a work made for hire, which is a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned in certain specified circumstances. When a work qualifies as a work made for hire, the employer, or commissioning party, is considered to be the author. See Circular 30, *Works Made for Hire*.

Copyright information from Copyright Basics page.

How Can I Protect My Work?

Copyright exists automatically in an original work of authorship once it is fixed in a tangible medium, but a copyright owner can take steps to enhance the protections of copyright, the most important of which is registering the work. Although registering a work is not mandatory, for works of U.S. origin, registration (or refusal) is necessary to enforce the exclusive rights of copyright through litigation.

Applying a copyright notice to a work has not been required since March 1, 1989, but may still provide practical and legal benefits. Notice typically consists of the copyright symbol or the word “Copyright,” the name of the copyright owner, and the year of first publication. Placing a copyright notice on a work is not a substitute for registration.

Benefits of Registration

Registration establishes a claim to copyright with the Copyright Office. An application for copyright registration can be filed by the author or owner of an exclusive right in a work, the owner of all exclusive rights, or an agent on behalf of an author or owner. An application

contains three essential elements: a completed application form, a nonrefundable filing fee, and a nonreturnable deposit—that is, a copy or copies of the work being registered and “deposited” with the Copyright Office. A certificate of registration creates a public record of key facts relating to the authorship and owner-ship of the claimed work, including the title of the work, the author of the work, the name and address of the claimant or copyright owner, the year of creation, and information about whether the work is published, has been previously registered, or includes preexisting material. You can submit an application online through www.copyright.gov or on a paper application. For more information on registering a work with the Copyright Office, see Copyright Registration (Circular 2). In addition to establishing a public record of a copyright claim, registration offers several other statutory advantages:

- Before an infringement suit may be filed in court, registration (or refusal) is necessary for works of U.S. origin.
- Registration establishes prima facie evidence of the validity of the copyright and facts stated in the certificate when registration is made before or within five years of publication.
- When registration is made prior to infringement or within three months after publication of a work, a copyright owner is eligible for statutory damages, attorneys’ fees, and costs.
- Registration permits a copyright owner to establish a record with the U.S. Customs and Border Protection (CBP) for protection against the importation of infringing copies.

Registration can be made at any time within the life of the copyright. If you register before publication, you do not have to re-register when the work is published, although you can register the published edition, if desired.

Copyright Notice

A copyright notice is a statement placed on copies or phonorecords of a work to inform the public that a copyright owner is claiming ownership of the work. A copyright notice consists of three elements:

- The copyright symbol © or (p) for phonorecords, the word “Copyright,” or the abbreviation “Copr.”;
- The year of first publication of the work (or of creation if the work is unpublished); and
- The name of the copyright owner, an abbreviation by which the name can be recognized, or a generally known alternative designation.

A notice should be affixed to copies or phonorecords of a work in a way that gives reasonable notice of the claim of copyright.

Using a copyright notice is optional for unpublished works, foreign works, and works published on or after March 1, 1989. However, notice conveys the following benefits:

- It puts potential users on notice that copyright is claimed in the work.
- For published works, notice may prevent a defendant from attempting to limit liability for damages or injunctive relief based on an “innocent infringement” defense.
- It identifies the copyright owner at the time of first publication for parties seeking permission to use the work.
- It identifies the year of first publication, which can be used to determine the term of copyright for anonymous or pseudonymous works or works made for hire.

- It may prevent the work from becoming an “orphan” by identifying the copyright owner or specifying the term of copyright. Orphan works are original works of authorship for which prospective users cannot identify or locate copyright owners to request permission.

Notice was required for works published in the United States before March 1, 1989. Works published without notice before that date may have entered the public domain in this country. For more information, see Copyright Notice (Circular 3).

What Is Publication and Why Is It Important?

Under copyright law, publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership or by rental, lease, or lending. Offering to distribute copies or phonorecords to a group of people for purposes of further distribution, public performance, or public display also constitutes publication.

Whether a work is published has important implications, including:

- The year of publication may determine the length of the copyright term for a work made for hire or an anonymous or pseudonymous work.
- The year of publication may determine the length of the copyright term if the work was created before January 1, 1978, and was published or registered before that date.
- The year of publication may determine the length of the copyright term if the work was created before January 1, 1978, and was first published between January 1, 1978, and December 31, 2002.
- The date and nation of first publication may determine if a foreign work is eligible for copyright protection in the United States.
- A certificate of registration creates certain legal presumptions if the work is registered before or within five years after the work was first published.
- A copyright owner may be entitled to claim statutory damages and attorneys’ fees in an infringement lawsuit if the work was registered before the infringement began or within three months after the first publication of that work.
- Many of the exceptions and limitations on the copyright owner’s exclusive rights vary depending on whether the work is published or unpublished.
- As a general rule, works published before March 1, 1989, must be published with a valid copyright notice.
- The deposit requirements for registering a published work differ from the requirements for registering an unpublished work.
- Works published in the United States may be subject to mandatory deposit with the Library of Congress. For more information, see “What Is Mandatory Deposit?” below.

When you register your work with the Office, you must determine whether the work is published or unpublished. For further information regarding publication, see chapter 1900 of Compendium of U.S. Copyright Office Practices